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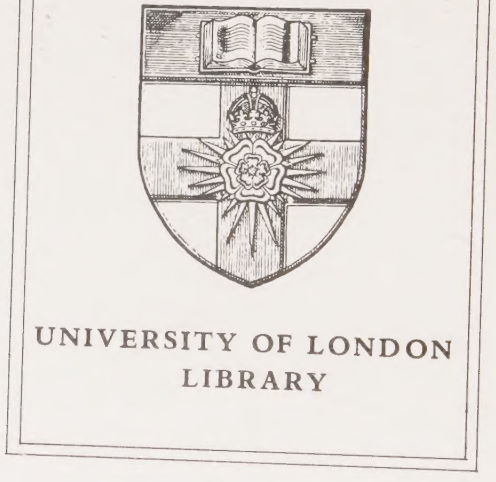

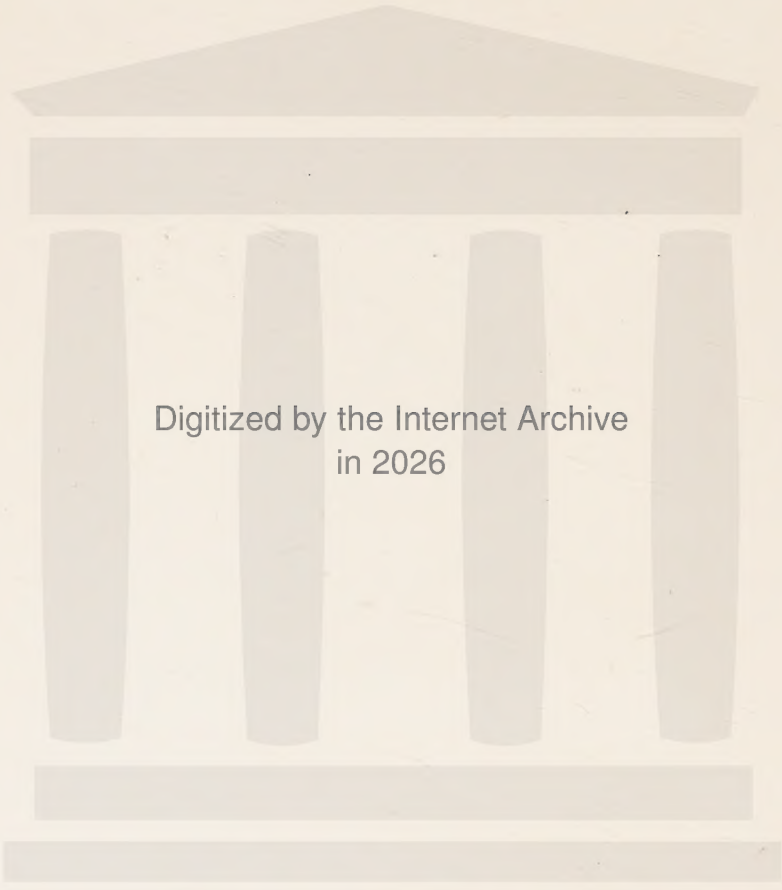
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THE

CRIMINAL APPEAL REPORTS.

WITH

SUBJECT INDEX, TABLES OF CASES AND STATUTES CITED.

EDITED BY

HERMAN COHEN,

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

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ERRATA.

Page 50—In headnote *for* "were" *read* "are."
Page 66—*for* "Summary Jurisdiction Act, s. 108," *read* "s. 10."
Page 118—*for* "Metropolitan Police Act, 1859," *read* "1839."

ADDENDA.

In the reports of *Garland's case*, p. 75, *add* 3 Cr. App. R. 199.
Page 144—date of *Mitchel* is 1848.

CRIMINAL APPEAL RULES.

R. 4 (d) 132

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE RIDLEY, AND MR. JUSTICE BAILHACHE.

WILLIAM SMALLMAN.

1914
12 *January.*

Considerable latitude should be allowed to defendant's counsel in cross-examination.

Proviso to s. 4 (1) of the Criminal Appeal Act applied, though a cross-examination was wrongly stopped.

This was an appeal against conviction by leave of Avory J. Appellant was convicted of feloniously receiving stolen property, at the Manchester City Sessions, on the 8th December, 1913, and was sentenced to six months' imprisonment with hard labour.

E. T. Nelson for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant was charged with a man named Lever, who was arrested in possession of stolen brass and copper, and made statements implicating the appellant, and my first ground of appeal is that there was no evidence that the appellant was ever in possession of the goods. I made a submission to that effect at the end of the case for the prosecution, but without success. The next point is that there was no substantial corroboration of the evidence of Lever, who was an accomplice. The evidence of Mr. and Mrs. Frost and Dr. Pritchard, at the most, only shewed that appellant and Lever had been seen together from time to time on the premises on which part of the stolen goods were found. Lever was the tenant, and the fact that appellant had, at Lever's request, asked Mrs. Frost to furnish two additional keys for the premises did not shew that appellant had any knowledge of the business Lever was carrying on. Further, there was no evidence against him at the close of the case for the defence.

Lever gave evidence, and I cross-examined him to show the state of his mind; his answers would have been material—see *Yewin*,

1914
12 *January.*

WILLIAM SMALLMAN.

Reading L.C.J.
Ridley J.
Bailhache J.

2 Camp. 638, n. (1811)—but the Deputy-Chairman stopped my cross-examination on the ground that it was irrelevant.

Lastly, the summing up was unsatisfactory, as, although the Deputy-Chairman told the jury that corroboration was required, he did not explain what corroboration was; and he did not direct them on the question of possession.

J. H. Thorpe for the Crown (who was called upon only as to the stopping of Mr. Nelson's cross-examination). It may be that this action by the Deputy-Chairman cannot be supported, but even if it is assumed that Lever was not to be believed, there has been no miscarriage of justice, and the proviso to s. 4 (1) would apply. The appellant gave evidence, and the jury could form their own opinion upon it.

The LORD CHIEF JUSTICE: The appellant was indicted with one Lever for stealing and receiving 1,400 lbs. of brass and copper, the property of the Manchester Corporation, and both were convicted of receiving and sentenced to six months' imprisonment with hard labour. There is no appeal by Lever, but the appellant appeals against his conviction, and the first point taken by counsel on his behalf is that it was essential for the prosecution to shew that he had possession of the goods which had undoubtedly been stolen at some time by some person. The stolen goods were found on premises in Cheltenham Street, of which Lever was the tenant, and counsel says that at the close of the case for the Crown there was no evidence on which the appellant could be convicted of receiving, and that therefore the Deputy-Recorder ought to have directed an acquittal. Now, it is sufficient for us, after considering the evidence of Mr. and Mrs. Frost and Dr. Pritchard, coupled with the further evidence of a police inspector as to a conversation in his presence between the prisoners, to say that, although there was not strong evidence, we cannot hold, as a matter of law, that there was no evidence. There certainly was some evidence to connect the appellant very directly with Lever. For instance, the appellant said, "This is my man," indicating Lever, "and we are joining in partnership:" further, the store-room was let to Lever, and the appellant said, "The old man wants two extra keys, as it is a lot of trouble passing the key from one to the other." Two keys were made and given to the appellant; although one of them

was found on Lever, none was found on the appellant, and the second key has never been found. The Court is therefore satisfied that there was sufficient evidence in law to justify the Deputy-Recorder in refusing to stop the case.

It is said further that, taking also into account the evidence given for the defence, there was no evidence against the appellant. That contention is quite untenable. Lever's evidence, if accepted, was the strongest evidence against the appellant. It is true that Lever was an accomplice, but there was abundant corroboration in the evidence of the witnesses already mentioned. The last point taken by counsel is that the judge misdirected the jury or put the case unfairly against the appellant. We are satisfied, taking the summing up as a whole, that it was quite fair to him.

There remains one point. After Lever had given evidence against the appellant which, if accepted, would undoubtedly have convicted him, counsel for the appellant cross-examined him as to a conversation alleged to have taken place between Lever and Bell, which was in substance directed to shew that Lever had attempted to suborn Bell to commit perjury, and further to shew that the appellant had had no part in the transaction between Bell and Lever beyond giving brass fittings, which were admittedly his property, to Bell. The Deputy-Recorder stopped counsel from pressing this cross-examination. It is sufficient to say that, while neither point was directly relevant to the matter, the questions upon them were put in the course of cross-examination to the credibility of Lever, and we think that the Deputy-Recorder ought to have allowed counsel to pursue his cross-examination. We shall not attempt to lay down any definite principle on which the Court should act in checking or preventing cross-examination on the accused's behalf except to say that great latitude should be allowed, and that care should be taken not to stop a cross-examination which, although it may appear lengthy and wide of the point, may subsequently prove to be of value.

Counsel for the Crown, not persisting in his argument that the cross-examination was properly stopped, argues that in pursuance of our powers under the proviso in s. 4 (1) of the Criminal Appeal Act, although we find that the Deputy-Recorder took a wrong view in stopping the cross-examination, we ought to hold that there has been no substantial miscarriage of justice. This Court has often had to deal with that proviso, and has expressed the opinion

1914
12 *January.*

WILLIAM SMALLMAN.

Reading L.C.J.

that, once it comes to the conclusion that a wrong decision has been given during the course of the case, the Court should never allow the conviction to stand unless it comes to the conclusion that the jury would certainly have convicted even if such wrong decision had never been given. In this case, bearing in mind that the appellant gave evidence in considerable detail and on the very point on which cross-examination had been stopped, and that his counsel also called Bell and examined him on the point, we have come to the conclusion that, even if the cross-examination had been allowed and counsel had persisted to the end, the jury would have come to the same decision. Therefore, acting on the proviso, we think that the conviction must stand, notwithstanding the fact that the cross-examination ought not to have been stopped.

Appeal dismissed.

A. L. B. T.

MICHAEL JOSEPH RYAN.

"Wilfully" in 1 & 2 Geo. 5, c. 6, s. 4 (i) (b), the Perjury Act, 1911, means intentionally.

This was an appeal against conviction on a point of law. Appellant was convicted of making false certificates of death, at the Manchester Assizes, on the 1st December, 1913, before Avory J., and was sentenced to six months' imprisonment in the second division.

Merriman for the appellant, who was not present. The appellant is a registered medical practitioner, and although in the indictment on which he was convicted he was charged alone, there were also two other indictments, on which he was not tried, where he was indicted jointly with Vose, the superintendent of an insurance company. Vose by means of the death certificates obtained large sums of money from the company. The conviction of the appellant was under the Perjury Act, 1911 (1 & 2 Geo. 5, c. 6), s. 4 (i) (b), which makes it a misdemeanour if any person "wilfully makes any false certificate or declaration under or for the purposes of any Act relating to the registration of births and

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12 *January.*

MICHAEL JOSEPH RYAN.

Reading L.C.J. Ridley J. Bailhache J.

deaths." The certificates in question in this case were alleged to have been made under the Births and Deaths Registration Act, 1874 (37 & 38 Vict. c. 88), s. 20 (2). The seven persons about whom certificates were given were all alive, and the appellant admitted that he gave the certificates because he was told that they were dead, and that their deaths were already registered, but that as they had died at unknown dates in different parts of the country or abroad there was difficulty in tracing the place of death, and the insurance company required certificates before they could pay the money due on the insurance policies.

The only question in the case is the meaning of "wilfully makes any false certificate," and in my submission it is not enough to prove that the appellant gave what was in form a certificate; it must be proved that it was given under the Births and Deaths Registration Act, 1874, s. 20 (2), which is: "In case of the death of any person who has been attended during his last illness by a registered medical practitioner, that practitioner shall sign and give to some person required by this Act to give information concerning the death a certificate stating to the best of his knowledge and belief the cause of death, and such person shall, upon giving information concerning the death, or giving notice of the death, deliver that certificate to the registrar, and the cause of death as stated in that certificate shall be entered in the register, together with the name of the certifying medical practitioner." Here there had not been the death of any person attended by a medical practitioner, nor were the certificates signed by such a practitioner. It may be that the appellant forged death certificates, but he has not been indicted for that.

Secondly, the certificate must be given wilfully with the intention that it shall be used under the Act, that is, for the registration of a birth or death; that was not the case here. Sect. 40 (2) of the Act of 1874, recognised the two offences of making a false certificate and forging or falsifying a certificate; the Perjury Act, 1911, only repeals the first part of this section, but it may be that the latter portion is repealed and re-enacted by the Forgery Act, 1913 (3 & 4 Geo. 5, c. 27). The summing up did not put to the jury the contention of the defence or the meaning of the section.

Gordon Hewart, K.C., and *Comyns Carr*, for the Crown, were not called upon.

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12 *January.*

MICHAEL JOSEPH RYAN.

Reading L.C.J.

The LORD CHIEF JUSTICE: The appellant was convicted on an indictment under the Perjury Act, 1911, s. 4 (i) (b), of wilfully making false certificates of death purporting to be made under the Births and Deaths Registration Act, 1874. He was a doctor, practising at Bolton, and it is sufficient to say that between January and May, 1913, he gave certain certificates of death on the usual forms distributed by the Registrar-General, which are in a book, and to which counterfoils are attached. The appellant certified that he had attended particular persons in their last illnesses, and stated the cause of death in each case. In fact, he had not seen or attended these persons, and indeed they were not dead. Vose, who appears to have been the superintendent of an insurance company, applied to him to give the certificates to be used as what he called "cover certificates." According to the appellant, Vose said that the certificates were required to enable the company to pay over the insurance moneys. It is quite unnecessary to travel through all the facts which are undisputed. It appears from the book which was produced that fourteen certificates were missing; seven were referred to in the course of the case, and seven persons who had been certified by the appellant as having died, were called as witnesses. £27 was received by him for the certificates, which were not more, and probably less, than fourteen in number. He was charged with wilfully making false certificates, and it is clear on the facts, apart from the law, that no defence could be established.

Mr. Merriman has argued very ably and clearly that nevertheless the conviction ought to be quashed, because the direction of the judge as to the meaning of "wilfully" in s. 4 of the Perjury Act, 1911, was not sufficient, and did not go far enough. He argues that it means that the certificates were given intentionally under a particular statute, namely, the Births and Deaths Registration Act, 1874, and that if the jury took the view on the evidence that the certificates were merely to be used as cover certificates and not for registering a death under the Act, then, notwithstanding that the appellant gave the certificates with statements which were false, and false to his knowledge, they could not find him guilty of making them wilfully under the Act. We are unable to accept Mr. Merriman's contention. The Act refers to making a false certificate under or for the purposes of any Act relating to the registration of births and deaths. That implies

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12 *January.*

MICHAEL JOSEPH RYAN.

Reading L.C.J.

that there may be a false certificate under such an Act which is not for the purpose of the Act. We have come to the conclusion that the judge was right in the view he took that "wilfully" means "intentionally," and "intentionally" means that he knew at the time of the making of these certificates that he was making false statements in relation to documents which purported to be made under the Act for the registration of births or deaths, and could be used under the Act. That conclusion disposes of the contention put forward by the defence, and it is therefore unnecessary to consider the summing up, which takes the same view as that expressed by us.

Appeal dismissed.

Solicitor for the Appellant—*Russell & Russell*, Bolton.

A. L. B. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE RIDLEY, AND MR. JUSTICE BANKES.

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JOSEPH MARCUS COPELEVITZ JOSEPHSON.

Severity of sentence.
For the purposes of sentence, previous acquittals should be wholly disregarded.

This was an appeal against sentence by leave of the full Court. Appellant was convicted of assault, on the 4th December, 1913, at the County of London Sessions, before the Deputy-Chairman; he was sentenced to twelve months' imprisonment with hard labour, and was recommended for expulsion.

Vachell, K.C. (with him *S. Lynch*) for the appellant, who was present. The indictment charged the appellant with six indecent assaults on Violet Sharp, and there were also counts for a common assault in each case. Another indictment charged him with two indecent assaults on Elsie Norman, with counts for common assaults. He pleaded guilty to one common assault on Violet Sharp, and this plea was accepted. The appellant at the police court gave evidence denying any indecency, and justifying the assaults as chastisement which he was bound to inflict on the girls, who were his apprentices, for faults committed in their employment. For one such assault he has received the maximum sentence, and is recommended for expulsion. (He was stopped by the Court.)

Curtis Bennett, for the Crown. The character of the appellant and the surrounding circumstances were properly taken into consideration. He was sentenced to ten years' penal servitude in 1893 for administering a drug with intent to rob, and to two years' imprisonment with hard labour in 1905 for conspiracy to rob. Since then he has three times been charged with various offences, but has been acquitted. Although in determining the length of

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sentence it would not be proper to take this into consideration, it is material on the question of recommendation for expulsion.

[The LORD CHIEF JUSTICE: The proper thing is to disregard altogether the cases where the appellant was acquitted.]

Inspector Baxter gave the appellant a very bad character, apart from the convictions. It does not follow that the Home Secretary will act on the recommendation, but it enables him to have inquiries made, and to order expulsion if he thinks fit.

Vachell, K.C. The opinion of the Home Secretary would be based on police reports; even if the case for the prisoner is before him, it is only in writing. The appellant has lived in this country for twenty-three years; he is an inventor, and is a director of a company which has acquired the rights in his patents. It would be a very difficult thing for him to have to start life afresh in another country.

The LORD CHIEF JUSTICE: The appellant pleaded guilty to a common assault, and was sentenced by the Deputy-Chairman to twelve months' imprisonment with hard labour and recommended for expulsion; he now appeals against that sentence. The facts, so far as they are material, are not in dispute, and can be shortly stated. Violet Sharp was apprenticed to the appellant to learn commercial correspondence. The appellant kept a book of faults, and when a certain number of entries were made against an apprentice, that apprentice was subjected to punishment of a kind which led to charges of indecent assault being made against the appellant. The indictment alleged six cases of such assaults occurring within twelve months, the chastisement being inflicted with a ruler to which pieces of leather were attached. The punishment was inflicted on the girl's bare flesh as she lay face downwards on a chair. If serious bodily injury had been caused the case would have been very different; but while it is right to say that the appellant does not seem to have inflicted any serious pain, it is equally right to say that he had no right to chastise the girl in this way, and it is necessary that the Court should mark its sense of the wrong inflicted upon her. There was no indication of any indecency, so we must deal with the case as one of common

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assault. The maximum sentence for a common assault was imposed, and, in our view, taking into consideration all the circumstances, it was too severe, and we think that three months imprisonment, with hard labour, is sufficient.

On the question of the recommendation for expulsion, it must be borne in mind that the appellant was sentenced, it is true, as long ago as 1893, to ten years' penal servitude for administering a drug with intent to rob, and in 1905 to two years' imprisonment, with hard labour, for conspiracy. The Deputy-Chairman took these convictions into account in the recommendation he made, and he did not order expulsion; he had no jurisdiction to make any such order, but he recommended it, which means that, in his view, the appellant is a person against whom an order for expulsion should be made, if the Home Secretary on the materials before him thinks fit to make such an order. It supplies a *primâ facie* ground on which the Home Secretary can exercise his jurisdiction: until a recommendation is made he has no power under the Aliens Act, 1905, to make such an order. The Home Secretary has an opportunity of making inquiries which is not open to us. He certainly can, and, as I know from my own experience, does hear all that can be said on behalf of the prisoner, though it is true that it is only in writing, and also whatever can be said against him. On the materials before us we are of opinion that we ought not to reverse the decision of the Deputy-Chairman, which is a matter for his discretion, but we also desire to say that we wish to express no opinion adverse to the appellant. We leave the matter where it is, as we think that the Home Secretary is in a better position than we are to make inquiries. The sentence will run from the date of conviction.

Sentence reduced.

Solicitor for the Appellant—*R.N. Appleyard.*

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Habitual Criminal.

Other previous convictions than the three statutory ones (under s. 10 (2) (a) of the Prevention of Crime Act, 1908) may be proved less strictly than is provided by 34 & 35 Vict. c. 112, the Prevention of Crimes Act, 1871, s. 18. Franklin, 3 *Cr. App. R.* (1909) *followed.*

Such other convictions may be adduced as relating to "character and repute" under s. 10 (5) of the former Act.

In the statutory notice under that section, if it is alleged that the accused has consorted with thieves, it is not obligatory to state their names, or the times or the places of such association. Turner, 3 *Cr. App. R.* 103 (1910) *followed.*

This was an appeal against conviction as a habitual criminal on the certificate of the Chairman of the Worcestershire Quarter Sessions; there was also an application for leave to appeal against conviction for housebreaking. Appellant was convicted on these charges on the 5th January, 1914, and was sentenced to five years' penal servitude and five years' preventive detention.

Sherwood for the appellant (under s. 10 of the Criminal Appeal Act), who was present. On the conviction for housebreaking the appellant was undoubtedly identified by two witnesses as having been in the neighbourhood, but the identification was unsatisfactory; he was not picked out by the witnesses until he had himself challenged their attention.

On the conviction as a habitual criminal, the first ground mentioned in the certificate is, "That the notice served on the prisoner related in the Schedule to convictions which had taken place prior to his last release from prison." The learned Chairman, as appears from the course of the trial, meant to state two points: (1) Whether the production of a document containing a list of previous convictions is, without any other evidence, legal proof of such convictions? (2) Whether all the previous convictions of a man are relevant upon the issue of habitual criminality? As to the point based on the statutory notice served on the appellant under s. 10 (4) of the Prevention of Crime Act, 1908: in addition to the three statutory convictions which it was proposed to prove, and for each of which appellant had received sentences of penal servitude, the notice contained a list of some seventeen other

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convictions beginning in 1880. At the trial, after the three convictions had been properly proved, counsel for the Crown elicited from a police officer that he had received by post from the Criminal Record Office a list of appellant's convictions, and he then tendered the list in evidence. He referred to *Franklin*, 74 J. P. 24; 54 S. J. 217; 3 Cr. App. R. 48 (1909), as justifying this. The Chairman treated the document as evidence and alluded to it in his summing up. He said: "This man has certainly been in prison a large number of times; he has done a good deal of imprisonment." I do not think that this could refer merely to the three sentences of penal servitude. The indiscriminate putting in of a long record was stated not to be right by Channell J. in *Turner*, [1910] 1 K. B. 346; 79 L. J. K. B. 176; 102 L. T. 367; 74 J. P. 81; 54 S. J. 164; 26 T. L. R. 162; 3 Cr. App. R. 103. The judgment in that case clearly shews that the allegation of all a man's past offences without stint is wrong, the sole issue being whether a man *is* persistently leading a criminal life.

[BANKES J.: *Culliford*, 75 J. P. 232; 6 Cr. App. R. 142 (1911), covers the point you raise.]

I admit that decided cases give countenance to the idea that less strict proof may be given of other convictions than is required in respect of the three statutory ones: but the statute itself contains nothing to justify any other means of proof than is provided by s. 18 of the 34 & 35 Vict. c. 112 (the Prevention of Crimes Act, 1871). Any decision to the contrary is wrong and ought to be over-ruled. There is only one way of proving a previous conviction: the way provided by the last-mentioned statute.

[RIDLEY J.: In *Mash* v. *Darley*, [1914] 1 K. B. 1; 83 L. J. K. B. 78; (1913) W. N. 287; 30 T. L. R. 5, it was decided in the Divisional Court that the Evidence Act, 1851 (14 & 15 Vict. c. 99), only applied where in any proceeding it was necessary to prove the trial and conviction of any person. This would apply to the three statutory convictions, but that other convictions may be proved by any person who was present.]

That case referred to bastardy proceedings, which are not criminal proceedings. Two summary convictions were spoken to

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by a detective, which happened long ago and which would seem to have been known to the witness from hearsay only; if so, they ought not to have been admitted; and besides, they are too remote. The language of s. 10 (5) of the Prevention of Crime Act, 1908, shews that evidence of character and repute ought not to be indiscriminately admitted (but only "if the Court thinks fit"), and ought to relate to the time of the last arrest and not to earlier periods of a man's career.

The other grounds in the certificate are:—

(2) "That the prisoner having between the date of his discharge from prison and the end of March, 1913, been employed, the *onus* of proving that he was living a dishonest life after the 31st March, 1913, rested upon the prosecution to prove by some specific act or acts.

(3) That this *onus* was not discharged by merely proving that the prisoner had been seen on various occasions speaking to convicted thieves, and that something more than this was necessary to be proved.

(4) That the notice was bad in not alleging any date or dates, place or places, on or at which the prisoner was alleged to have been conversing or associating with convicted thieves, as it was impossible for the prisoner to bring evidence to contradict the fact unless he knew the date and place at which he was charged with so conversing."

The grounds given in the statutory notice apart from the previous convictions were:—

(2) "That subsequent to your last release from prison, which was on the 27th January, 1913, you were employed as a labourer by Messrs. Topham and Sunshall, of Oxford Street, Birmingham, for a period of seven weeks, and that you left this employment of your own accord at the end of March, 1913.

(3) That between the end of March, 1913, and the date of your latest arrest, you were frequently seen in Birmingham in the company of thieves and of persons of bad character."

Evidence of consorting with bad characters is not enough to support a conviction unless it is consorting under suspicious circumstances.

[RIDLEY J.: *John Smith*, 8 Cr. App. R. 150 (1913), is against you, and is a weaker case than this.]

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The statutory notice should have been more specific. Three days before the trial a copy of the additional evidence to be given against him was served on appellant, giving the names of people with whom he was said to have associated; it was then too late for him to see his friends, or get them to come and give evidence. In *Turner* it was stated that it would be sufficient to say in the notice that it was intended to prove that the prisoner was a habitual associate of thieves, but that was only given as an illustration. I ask that this Court should go a step further and say that he should be furnished with items of the names, dates, and places.

Cotes-Preedy for the Crown was not called upon. During the argument he called attention to *Westwood*, 8 Cr. App. R. 273 (1913).

THE LORD CHIEF JUSTICE: The appellant was convicted with a man named Sweeney of housebreaking; the appellant was also convicted as a habitual criminal, and we have heard arguments against both convictions. It is necessary to state the facts shortly. On the evening of the 29th November, 1913, Mr. and Mrs. Giddens arrived home late, and noticing a light in the house went to the back door. Two men rushed out but were stopped at the gate. Some blows were struck, and the two men got away, but were followed by the prosecutor, and not long after the prisoners and two other men were brought back by the police. Mr. and Mrs. Giddens at once said the prisoners were the men. It is right to say that the appellant challenged the identification to some extent; he said, "Am I one?" The witnesses said "Yes." It is said that this was not a sufficient identification, and that we ought to come to the conclusion that the conviction was wrong. It is quite clear that there was abundant, not to say strong, evidence that the appellant was one of the men. No fault can be found with the summing up, which was favourable to him, and therefore there is no reason to interfere with the conviction for housebreaking.

He further appeals against his conviction as a habitual criminal. In substance this appeal is based, first, on the ground that, a list of the appellant's convictions having been included in the statutory notice of the evidence which might be brought against him, a document containing such a list was handed to the Chairman; this list was not read by him to the jury, and no statement was

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made to them of the contents of the document, but it is said by Mr. Sherwood that the Chairman made a statement to them which might have indicated that the appellant had been sentenced to terms of imprisonment as well as three sentences of penal servitude. In our opinion there was nothing in the summing up to convey to the jury that the appellant had received sentences other than the three sentences of penal servitude referred to in the statutory notice which had been properly proved.

It is further said that evidence was given of two summary convictions. This is true, but the evidence was given in circumstances which, in our opinion, and in accordance with previous decisions, justified it. The detective was giving evidence of reputation, as he was entitled to do under s. 10 (5) of the Criminal Appeal Act. It was argued that he was speaking of matters of which he had no knowledge, but it became apparent in the course of the argument that this was a misapprehension, and therefore this point disappears

Then it is argued that the notice was bad, which said: "That between the end of March, 1913, and the date of your latest arrest you were frequently seen in Birmingham in the company of thieves and of persons of bad character." That is in accordance with the form that has been before the Court on many occasions, and it complies, in our view, with the form of notice which it is incumbent to give. The object of the notice is to call the attention of the prisoner to the evidence which it is proposed to bring, so that he may be prepared to meet it. It is quite true to say that the burden is on the Crown to prove that he is leading persistently a dishonest or criminal life, and to establish that it continued until the time of arrest. But to do that the prosecution is entitled to shew that, although he worked for a period, he had subsequently given up the employment, and that the only thing known about him since then was that he had been seen many times in the company of thieves. The notice informs him that this class of evidence may be given, and while he may have some difficulty in obtaining witnesses, that does not affect the validity of the notice, although it may be a ground for applying for an adjournment. In this case the notice was given in time, but it is said that the appellant did not know any names until a few days before his trial, when notice of the evidence was served upon him, including the names of persons with whom he was said to have been associating. It is plain to us that the notice is good: in the words of Channell J. in *Turner*: "The

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grounds upon which it is intended to prove that the prisoner is leading persistently a dishonest or criminal life must be stated in a general way as grounds of proof, but not as evidence: *e.g.*, it would be sufficient to state that the prisoner is a habitual associate of thieves, or that he is doing no work and has no visible means by which he is earning an honest livelihood, or that he is now doing the very same thing that he did years ago and for which he was convicted." That general notice was given, and was sufficient. It is said that the prisoner was embarrassed, but there are no grounds to justify that contention. The summing up and the argument shew that everything that could possibly be said in his favour was said. The jury on the evidence could find him a habitual criminal, and he has no grievance.

It is also argued that something more than consorting with persons of bad character must be proved. In the view of the Court, when a notice of this kind is given proof of that fact is sufficient, and it is not necessary to shew that he was consorting at suspicious times. The man is not in work, and is proved to be in constant association with persons of bad character, and in our opinion that is sufficient.

Appeal dismissed.

A. L. B. T.

THOMAS JONES WILKS.

The Court may give effect to a point of law which might have been taken for the defence at the trial.

On a charge of obtaining by false pretences evidence of exactly similar conduct by defendant on a previous occasion when a similar offence was alleged (though no charge was made) to that alleged at the trial, is admissible.

This was an appeal against conviction on a point of law. Appellant was convicted, at the Swansea Borough Sessions, on the 2nd January, 1914, of obtaining goods by false pretences, and was sentenced to four months' imprisonment with hard labour.

J. Bowen Davies for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. The false pretence alleged in the indictment was that appellant pretended to Hilda Hertz that he was a wholesale and retail merchant carrying on business at 65, Tymawr Street, Swansea, and my first ground of appeal

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is that prosecutor did not part with the property in the coat, which appellant was alleged to have obtained, owing to the false pretence alleged. The evidence was that appellant called at prosecutor's shop and said that he wanted to buy a seal coney coat. A bill was being made out, when he said, "Don't trouble, I will pay cash on delivery." He shewed, as he said, in order merely to give his address, a billhead with the words "Wholesale and retail merchant" on it. The coat was handed to a boy to deliver at the address given, and he was also given a receipt and a penny stamp: across the receipt was written "Paid with thanks" by Hilda Hertz. He said that he waited at the house for ten minutes, and that he repeatedly said that he must have the coat or the money. A woman named Mrs. Bath had put on the coat, and it may be that it was larceny by a trick on her part, but there was nothing to shew that she was appellant's agent. The representation may have induced prosecutor to send the coat to the house, but it was at the most only a conditional sale, the condition being that cash should be paid. Parting with possession is not enough to sustain a charge of obtaining goods by false pretences; there must be a parting with the property. The jury were led to believe that the mere sending of the coat amounted to parting with the property. I admit that I did not take this point at the trial, but the Recorder put it to the jury.

Secondly, appellant never said that he was a wholesale and retail merchant; he put the billhead before Miss Hertz with the statement, "That is my name and address; send it there." This is not sufficient.

Thirdly, the prosecution failed to prove the falsity of the alleged pretence. Witnesses on both sides said that appellant did carry on a business at the address given. If he had exaggerated the nature of this business this would not justify a conviction. In his summing up the Recorder suggested that the *onus* of disproving the falsity lay on appellant, as he could have gone into the box, produced invoices and books, and called customers. This was a misdirection.

Lastly, evidence which, I submit, was inadmissible was admitted, namely, of another alleged false pretence by appellant on the 7th August, whereas the alleged offence then on trial was on the 27th November. One Levi, a retail clothier, deposed that on 7th August Wilks called at his shop, selected goods, and

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shewed a billhead identical with that shewn to Miss Hertz, asked to have the goods sent, and promised to pay on delivery; the goods were sent, Wilks himself took them from the messenger, but he never did pay for them. Levi swore that the words "wholesale and retail merchant" in the bill induced him to let the goods go. No proceedings were taken. In the cases where evidence of one act has been admitted to prove system it has occurred within a few days of the offence, and has pointed to a continuing course of conduct, or arises out of the same transaction. In false pretences that sort of evidence to be admissible must shew a system: *Rhodes*, [1899] 1 Q. B. 77; 68 L. J. Q. B. 83; 79 L. T. 360; 47 W. R. 121; 62 J. P. 774; C. C. R.; *Ollis*, [1900] 2 Q. B. 758; 83 L. T. 251; 49 W. R. 76; 64 J. P. 518; 19 Cox C. C. 554; C. C. R.; and *Francis*, L. R. 2 C. C. 128; 43 L. J. M. C. 97; 30 L. T. 503; 22 W. R. 663; 12 Cox C. C. 612 (1874). The pretences also must be of a similar character: *Fisher*, [1910] 1 K. B. 149; 79 L. J. K. B. 187; 102 L. T. 111; 74 J. P. 104; 26 T. L. R. 122; 3 Cr. App. R. 176; here in the case of which evidence was given appellant shewed not only a billhead but also a cheque.

Manlay Samson for the Crown was called on only on the first and last points. On the last point the *nexus* was not the question of time but the use of the billhead which, on the authority of *Fisher*, rendered the evidence admissible, as that of system, and negativing the defence that the billhead was used innocently to give an address. As to time, *Rhodes* shews that evidence of previous transactions at a period not too remote is admissible.

[RIDLEY J.: In *Rond*, [1906] 2 K. B. 389; 75 L. J. K. B. 693; 95 L. T. 296; 54 W. R. 586; 70 J. P. 424; 21 Cox C. C. 252; 22 T. L. R. 633; C. C. R., the intervals were much longer than here.]

Ellis, [1910] 2 K. B. 746; 79 L. J. K. B. 841; 102 L. T. 922; 74 J. P. 388; 22 Cox C. C. 330; 26 T. L. R. 535; 3 Cr. App. R. 41, shews that evidence of a systematic course of swindling by the same methods is admissible.

On the first point appellant could be convicted of the attempt, even if the point is a good one, so there has been no miscarriage

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of justice. Apart from that, the evidence does bear out the contention that Miss Hertz parted with the property in the coat and on the representation made by appellant. It was open to the jury to find so. A false representation coupled with a promise is sufficient to justify a conviction: *Fry*, Dears. & B. 449; 27 L. J. M. C. 68; 4 Jur. (N. S.) 266; 6 W. R. 245; 7 Cox C. C. 394 (1858); C. C. R.; therefore the conviction is not bad, because, in addition to the false representation, there was also a promise to pay which might, or might not, have been fulfilled.

Bowen-Davies. The suggestion of convicting of the attempt only was never put to the jury. In *Francis* the transactions were within a very short time.

The LORD CHIEF JUSTICE: The appellant was convicted of obtaining a coney seal coat by false pretences, and appeals against his conviction. The questions which we have to consider on the arguments put forward are four, of which, in our opinion, the first and fourth alone are important. It is said in the first place that there was no evidence of any intention on the part of Hilda Hertz to part with the property in the coat, and that what was proved was at the most an intention to part with the possession and not the property, and that therefore the conviction cannot stand. This point was not taken at the trial; the grounds on which counsel for the defence submitted that the case against the appellant had not been made out did not include this point. No attention was directed, therefore, to this matter in the Court below, and that fact must be borne in mind when we are reading the summing up. No doubt if the attention of the Recorder had been directed to this point he would have given a more precise direction upon it, but all his attention was concentrated on the points that were raised before him. We have allowed the point to be taken and argued here, and if we came to the conclusion that it was a good one, and that if it had been made at the trial it would have affected the minds of the jury to such an extent that they would in consequence have returned a different verdict, we should have no hesitation in giving effect to our opinion. But in our view this point is not one of substance and there would have been no different result if the jury had been directed upon it, because, on the facts proved, it would appear that it was the

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intention of Hilda Hertz to part with the property in the coat when it was sent to the appellant's house. She intended to sell one of two coats, which were priced; she intended not only to part with possession of the coats, but also to pass the property in one of them. The fact that a boy intervened and took the two coats to the house, and, by mistake, as it is suggested, left one coat without bringing back the money, does not dispose of the contention that the appellant induced Miss Hertz to part with the property by means of the false pretence that he was a wholesale and retail merchant carrying on business at that address. Upon the whole, and accepting the proposition of law that there must be an intention to part with the property as distinguished from the possession, we are satisfied that the facts of the case shew that the offence was committed.

It is said that there was no evidence that the appellant represented that he was a wholesale and retail merchant, and therefore no evidence of any false pretence, and it is further argued that the prosecution failed to prove that the pretence, if made, was false. These are really questions of fact, and there was evidence on which the jury could find as they did. It cannot be said that there was no evidence, for it is clear on the evidence that Hilda Hertz would not have parted with the property but for the representation made on the billhead. There could be no point more fitted for a jury who were carefully directed upon it. As to the falsity of the pretence, the evidence given may not be strong evidence, but there was some evidence which was open to rebuttal; and in the absence of an explanation, the jury came to the conclusion that the pretence was false. The Recorder again gave a proper and careful summing up on the point.

The fourth point is that the Recorder admitted evidence of an act of false pretences committed on the 7th August, the offence charged being on the 27th November. Counsel argued that, on the authority of *Rhodes*, the evidence was only admissible to prove a systematic course of conduct, and that evidence of one offence three months before could not be given; and he contended that observations of Lord Russell C. J. and Wills J. pointed to that conclusion. There are now abundant authorities on this subject, but this particular case presents no difficulty. We do not say that the evidence was admissible to prove system, but to rebut a defence which was set up, namely, that, in handing the billhead

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with the statement which he made, the prisoner only intended to give his name and address and not to include his business. The question of intent to defraud then became an important matter, and the fact that the same billhead had been used on another occasion was properly admitted in evidence.

Once the facts are understood there is no difficulty, and in our opinion there is no ground for interfering with the conviction.

Appeal dismissed.

A. L. B. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE RIDLEY AND MR. JUSTICE ROWLATT.

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JAMES WHALEY.

Severity of sentence.

The Court will call the attention of the Home Secretary to a sentence not appealed against which it thinks too severe.

This was an appeal against conviction by leave of Horridge J., and an application for leave to appeal against sentence. Only the latter is material for the purposes of this report. Appellant was convicted of larceny, on the 7th January, 1914, at the Cheshire Sessions, holden at Knutsford, and was sentenced to twelve months' imprisonment with hard labour.

R. W. Bankes for the appellant (under s. 10 of the Criminal Appeal Act), who was present.

Trevor Lloyd for the Crown. The list of appellant's previous convictions is before the Court. (There were fourteen convictions, most of them being for larceny, and nineteen summary convictions for assault, poaching, &c.)

RIDLEY J. (after giving reasons for dismissing the appeal against conviction). The appellant was sentenced to twelve months' imprisonment with hard labour. The Court thinks that this sentence was severe. He is no doubt a very old offender; he has frequently been guilty of larceny and poaching, and has a long list of convictions. It is easy to understand why the sentence was passed. Still, the offence was merely that of stealing one duck, and in the opinion of the Court he ought not for that offence to have a longer sentence than six months' imprisonment with hard labour. Another man, Thomas Jackson, whose character

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was not so bad, was convicted with him; he was sentenced to six months' imprisonment with hard labour. He has not appealed, but the Court thinks it proper that the attention of the Home Secretary should be drawn to the case that he may consider whether he should not reduce his sentence so that it should bear a proper proportion to that of the appellant.

Sentence reduced.

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WILLIAM CADE.

Case stated.

"Instrument" in sect. 7 of 3 & 4 Geo. 5, c. 27, the Forgery Act, 1913, has the same meaning as it has in (repealed) s. 38 of 24 & 25 Vict. c. 98, the Forgery Act, 1861, and includes a letter.

This was an appeal against conviction on a case stated by the Common Serjeant, who tried the case, and an application for leave to appeal against sentence. Appellant was convicted, on the 13th January, 1914, at the Central Criminal Court, of demanding money on a forged instrument, and was sentenced to three months' imprisonment in the second division.

A. S. Comyns Carr for the appellant (under s. 10 of the Criminal Appeal Act), who was present. This appeal comes before the Court on a case stated under s. 20 (4) of the Criminal Appeal Act. The appellant is deaf and dumb, and the facts are sufficiently stated in the case, which is as follows:

"The prisoner pleaded guilty before me to an indictment charging that he 'feloniously did demand receive and obtain certain money to wit the sum of one pound of the moneys of Alfred Lazarus under upon and by virtue of a certain forged instrument to wit a forged request for the payment of one pound knowing the said forged instrument to be forged and with intent to defraud.'

The document referred to was a letter purporting to come from and to be signed by John Waller, who was employed by Mr. Lazarus, to whom it was addressed. The letter was as follows:—

Dear Mr. Lazarus—Will you send me £1 has to hire a drain machine has the drain in all the yards in Vine Court are stopped

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WILLIAM CADE.

Reading
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up. I am to Busy to call myself so I have sent Bearer the change will be given back when I have taken the machine back. I cannot get one no where unless I pay a Deposit of 20/.

Yours truly,

J. Waller.

the yards are almost flooded and W.C. stopped up.

The prisoner was sentenced to three months' imprisonment in the second division.

The question for the Court is whether the letter was a forged instrument' within s. 7 of the Forgery Act, 1913, 4 Geo. V. c. 27. See *The Queen* v. *Riley*, [1896] 1 Q. B. 309.

F. A. Bosanquet,

17th January, 1914."

Under s. 7 of the Forgery Act, 1913, "Every person shall be guilty of felony and on conviction thereof shall be liable to penal servitude for any term not exceeding fourteen years, who, with intent to defraud, demands, receives or obtains, or causes or procures to be delivered, paid or transferred to any person, or endeavours to receive or obtain, or to cause or procure to be delivered, paid or transferred to any person any money, security for money or other property, real or personal:—

"(a) under, upon, or by virtue of any forged instrument whatsoever, knowing the same to be forged."

This Act came into force on the 1st January, the day on which this offence was committed, and it is "An Act to consolidate, simplify and amend the Law relating to Forgery and kindred offences." S. 1 defines forgery as "the making of a false document that it may be used as genuine." The word "document" is used in ss. 2, 3, 4 and 5. In s. 7 the word "instrument" is used. This section substantially re-introduces (repealed) s. 38 of 24 & 25 Vict. c. 98, the Forgery Act, 1861, in which the word "instrument" is also used. The scheme of the Act is clearly that "instrument" is something different to, and less comprehensive than, "document"; they cannot be used as convertible terms. In s. 18, which is the

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definition section, "instrument" is used in the definition of "document of title to lands"; it is used clearly there as applying to documents of a special and formal kind. The only other use of the word in that section is in the definition of "valuable security," which is to include "any receipt or other instrument evidencing the payment of money, or the delivery of any chattel personal." Under s. 23 of the Act of 1861 it was a felony to forge any warrant, order, authority or request for the payment of money, such as this letter is. That section has disappeared in the new Act, and the only way in which the offence is included is by the definition of "valuable security," from which the word "request" has disappeared. Therefore, what was formerly a felony is now only a common law misdemeanour. I would suggest that "instrument" must be defined as a document which conveys some legal effect.

In *Riley*, [1896] 1 Q. B. 309; 65 L. J. M. C. 74; 74 L. T. 254; 44 W. R. 318; 18 Cox C. C. 285; 60 J. P. 519, a telegram which purported to accept an offer made by a bookmaker was held to be an instrument within s. 38 of the Forgery Act, 1861, but a decision under that section is not necessarily applicable to s. 7 of the new Act, because the Act must be looked at as a whole. In *Riley* the telegram came within my definition of "instrument," whereas the letter in the present case would not. In that case the Court was much divided, but Hawkins J. based his decision on the view that the telegram was an "instrument of contract," so he cannot be cited as an authority for the proposition that any document is an instrument. The judgment of Wills J., I admit, goes further, but he ends by saying that even if the true construction of the word "instrument" required a more restricted meaning he thought that the telegram would fall within it. He shewed that he thought his wider view went beyond that of the other judges, and was not necessary to the decision of the case. Mathew J. concurred with the decision of the majority of the Court, but did not say whether he accepted the view of Hawkins J. or of Wills J. Lord Russell C. J. and Vaughan Williams J., while not dissenting, doubted whether the telegram was an instrument. Even, therefore, if the Act of 1913 is applicable to this case, the Court is not bound to follow the more extensive view of Wills J. The letter in this case, even if genuine, did not entitle the writer to claim the money as of right.

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On the question of sentence, I cannot add to what appellant has said in his notice of appeal.

Roome for the Crown was not called upon.

The LORD CHIEF JUSTICE: The appellant pleaded guilty to an indictment charging him with the offence of demanding money on a forged instrument, which constituted a request for the payment of £1, knowing the same to have been forged, and with intent to defraud. The document on which the case turns is as follows: (His Lordship read the letter quoted above.) J. Waller, in whose name the letter was signed, was the name of a relation of the appellant who was in the employment of Lazarus. Waller was not the author of the letter; and there is no doubt that the document was forged. When the appellant, who is deaf and dumb, pleaded guilty, the Common Serjeant was not sure whether the plea was right, so, in accepting it, he said that he would state a case for the consideration of this Court. The matter comes before us for the consideration of a point of law, which really turns on the answer to one question only, that is, does the word "instrument" in s. 7 of the Forgery Act, 1913, carry the same meaning as it did in s. 38 of the Forgery Act, 1861? If it does, there is no doubt that this letter was an instrument within the meaning of the section, and that the appellant was properly convicted.

It must be remembered that the Forgery Act, 1913, was passed to consolidate, simplify and amend the law relating to forgery and kindred offences. Under s. 7, "Every person shall be guilty of felony and on conviction thereof shall be liable to penal servitude for any term not exceeding fourteen years, who, with intent to defraud demands, receives or obtains or causes or procures to be delivered, paid or transferred to any person, or endeavours to receive or obtain or to cause or procure to be delivered, paid or transferred to any person any money, security for money or other property, real or personal:—

"(a) under, upon, or by virtue of any forged instrument whatsoever, knowing the same to be forged."

This case therefore turns on the words "any forged instrument whatsoever." Similar words appear in s. 38 of the Forgery Act, 1861, and in *Riley* the Court of Crown Cases Reserved considered

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carefully the meaning of the word "instrument." It is sufficient to say that in that case, notwithstanding the doubts of Lord Russell C. J. and Vaughan Williams J., the view of the Court was that a telegram sent to accept a bet did come within the meaning of the word. Arguments were put to the Court then similar to these which have been put to-day. Mr. Comyns Carr suggests that *Riley* does not bind this Court. The document in the present case is a request that money should be paid so that it may be expended for the employer's benefit; therefore it was a business document, and if that is the meaning of "instrument," then this case is within the section.

Then Mr. Comyns Carr argues that we ought to distinguish the meaning of s. 7 of the Act of 1913 and s. 38 of the Act of 1861, and suggests that if we look at the various preceding and succeeding sections it will be found that we cannot read "document" and "instrument" as meaning the same thing. It is clear to us that this is an instrument within the meaning of s. 7, and that we must interpret "instrument" as covering a writing which is not confined to documents of title to lands. In our opinion, both on the authority of *Riley* and on the proper interpretation of s. 7, the offence with which the appellant was charged was committed, and this letter was an instrument within the meaning of the section. Our answer to the case is, therefore, that the offence was committed.

As to the sentence, once it is admitted that the offence was committed, we cannot say that the punishment was too severe. The Common Serjeant took into account every circumstance in the appellant's favour, particularly his affliction. In the end he passed the very lenient sentence of three months' imprisonment in the second division. We think that was lenient in view of all the circumstances, and cannot reduce it, but the Court thinks that the time that has elapsed since the trial should count towards the sentence.

Appeal dismissed.

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Reading
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Severity of sentence.
If the Court thinks that there was no case to be put to the jury, it will quash the conviction.
If the Court thinks that there has been a miscarriage of justice in respect of which there is no appeal, it will order facilities for an appeal to be given.

This was an appeal against sentence on the part of Jackson, and against conviction and sentence on the part of Reynolds, by leave of Horridge J. Appellants were convicted of larceny from the person, at the Bradford City Sessions, on the 14th January, 1914, and were each sentenced to three years' penal servitude.

Valentine Ball for appellant Reynolds (under s. 10 of the Criminal Appeal Act), who was present. The appellants, with another woman named Priestley, were charged with stealing money from the person of a man named Watson in a public-house. The jury found that Jackson actually took the money, and that the other two were accomplices. The ground of appeal is that Reynolds's defence was not emphasized by the Recorder in his summing up, and that there was no evidence to justify a conviction. (He was stopped by the Court.)

Charles Mellor for the Crown. There was evidence that the three women had been seen together before the offence. Reynolds put money back into the prosecutor's pocket on the way to the police-station; this is just what a guilty person would do. In any case it was a question of fact for the jury.

Appellant Jackson in person.

The LORD CHIEF JUSTICE: Reynolds was convicted with Jackson and Priestley of stealing £5 from Watson. Jackson pleaded guilty, and Reynolds and Priestley not guilty. Reynolds is appealing against conviction and sentence, Jackson against sentence, and Priestley not at all. The facts were that Watson went into a public-house and that the prisoners were there also. Jackson put her arms round Watson and took the money, and he gave them in charge outside the public-house. On the way to

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the police station Reynolds said to Watson, touching his pocket, "You will find thirty shillings in there," and he did find that sum there. The only other evidence against her was that Jackson stated that Reynolds said, "Give him his money back." Jackson took the blame upon herself, but as a result of the trial Reynolds was found guilty, and was sentenced with Jackson to three years' penal servitude. In the opinion of the Court this conviction is not satisfactory, as there is not sufficient evidence to justify the conviction of Reynolds. The Recorder seemed to take that view, as his summing up was favourable to her, but the jury thought otherwise. In our opinion this conviction ought not to stand.

With regard to the sentence passed on Jackson, she has been convicted many times before, but hitherto her heaviest sentence has been one of eight months' imprisonment. We think that the sentence is too severe, and that a sentence of twelve months' imprisonment with hard labour is sufficient.

Priestley can, if she likes, have an extension of time in which to apply for leave to appeal (*a*).

Jackson's case—*Sentence reduced.*

Reynolds's case—*Conviction quashed.*

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(*a*) See under Feb. 9 below.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BANKES AND MR. JUSTICE AVORY.

JOHN WILLIAM MANN.

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An attempt to commit suicide is attempted felony: Burgess, *L. & C.* 258 (1862), *explained.*

Appeal against sentence on a point of law heard without previous application.

This was an appeal against conviction, by leave of Horridge J. Appellant was convicted of attempted suicide, at the Bradford City Sessions, on the 14th January, 1914, and was sentenced to six months' imprisonment with hard labour.

Mockett for the appellant (under s. 10 of the Criminal Appeal Act), who was present. As the sentence imposed appears to be one which is not warranted by law, I ask leave to raise that point. For a common law misdemeanour only imprisonment without hard labour can be imposed; the question here is whether an attempt to commit suicide is an attempt to commit a felony. In Russell on Crimes, and in the article on Criminal Law in Lord Halsbury's Laws of England, it is stated that this offence is punishable by imprisonment without hard labour. In *Burgess*, 32 L. J. M. C. 55; L. & C. 258; 7 L. T. 472; 11 W. R. 96; 9 Cox C. C. 247; C. C. R. (1862), it was held that attempted suicide was not an attempt to commit murder within the Offences Against the Person Act, 1861 (24 & 25 Vict. c. 100), and was therefore still triable at quarter sessions. Then by the Forfeiture Act, 1870, s. 1 (33 & 34 Vict. c. 23), it was enacted that "No confession, verdict, inquest, conviction or judgment of, or for any treason or felony or felo de se, shall cause any attainder or corruption of blood, or any forfeiture or escheat." This wording

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suggests that *felonia de se* is a separate offence from felony. In *Doody*, 6 Cox C. C. 463 (1854), Wightman J. told the jury that the offence was a misdemeanour at common law.

As to conviction, the appellant was found on a tramcar suffering from the effects of salts of lemon. At the trial he made a statement that he was under the influence of drink at the time, and had no intention of killing himself. No direction to the jury on this defence was given, or on the question of intention. *Doody* is an example of the proper direction to be given to the jury in such a case.

C. B. Johnson for the Crown, who was called upon on the question of sentence only. An attempt to commit suicide is an attempt to commit a felony, and therefore hard labour can be imposed under the Hard Labour Act, 1823 (3 Geo. IV. c. 114). *Burgess* only excludes the offence from a particular section of the Offences Against the Person Act. The insertion of the words "felo de se" in the Forfeiture Act, 1870, is intended to clear away any doubt there might have been on the subject, and shews that it is a felony. Blackstone describes it as a species of felony, and it was attended by forfeiture of goods and chattels; see also Hawkins's Pleas of the Crown, B. II. c. 37, s. 20.

The LORD CHIEF JUSTICE: The appellant was convicted of attempted suicide, and was sentenced to six months' imprisonment with hard labour. Leave was given to appeal against conviction, but Mr. Mockett asked leave to argue also against the sentence, which we granted, as we thought it a proper application. It is said that this is not an offence for which hard labour can be imposed. Mr. Mockett has argued the case clearly, and, at the same time, has said all that can be said upon the question as a proposition of law. He bases his argument upon some of the text-books and upon the case of *Burgess*. We think that the view is wrong that is apparently taken by some writers that *Burgess* decides that attempted suicide is not an attempt to commit a felony, but is an attempt to commit a misdemeanour. The decision never purported to decide that. It only decided that the use of the word "murder" in ss. 11 to 15 of the Offences Against the Person Act, 1861, was intended to denote the murder of another, and not of oneself; it

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decided no more. Our attention has also been called to the Forfeiture Act, 1870, s. 1, the material words of which are, "No verdict or judgment of or for any treason or felony, or felo de se, shall cause any forfeiture." Mr. Mockett says that the fact that after the word "felony" come the words "felo de se" indicates that *felonia de se* was not regarded as a felony. The answer to that is, that this offence must be either a felony or a misdemeanour, and the probable, and, as it seems to us, the real explanation of its being separately mentioned is, that some doubt had been expressed whether it was a felony or not. The words themselves seem to be the best argument that it is a felony. Once established that the attempt was to commit a felony and not a misdemeanour, it becomes clear that the offence comes under the Hard Labour Act, which enables hard labour to be imposed. The point of law therefore fails.

It was further argued that the conviction ought not to stand because of a statement by the appellant, which was not made on oath, that he could not remember buying or taking the salts of lemon, and that it had never entered his head to take his life. Criticism is directed to the fact that the Recorder never indicated to the jury the law on the point. No doubt it would have been better if the attention of the jury had been directed to this specific point, but we have no hesitation whatever in saying that if they had been so directed, on the facts proved, their answer must have been the same. Consequently there has, in our opinion, been no substantial miscarriage of justice, and the conviction must stand.

Further, we are of opinion that, while it was competent to pass the sentence that was imposed, on the whole six months' detention by imprisonment will be sufficient to meet the justice of the case. We therefore reduce the sentence by quashing that part of it that imposes hard labour. We think that restraint and discipline cannot injure the appellant, and we cannot leave out of our consideration the fact that he has twice been in prison before for attempted suicide.

Sentence varied.

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CHARLES PRIDAY.

Severity of sentence.

This was an appeal against sentence, by leave of Horridge J. Appellant was convicted at the Gloucester County Sessions, on the 7th January, 1914, of causing malicious damage to property, and was sentenced to four months' imprisonment with hard labour.

S. L. Porter for the appellant, who was not present. The appellant was convicted of damaging the shrubs of his next door neighbour; the prosecutor had suspected him, and therefore had watched him for some months; the appellant resented being spied upon in this way. Moreover, on the day in question, the appellant had been drinking, and his whole behaviour shewed that his conduct was not normal from this cause. He has never been convicted before, and has always borne an excellent character.

A. E. N. Jordan for the Crown. The appellant was evidently a man whom the magistrates thought might resort to violence. When arrested he challenged the prosecutor and a police constable to fight. At the trial he said the whole thing was a conspiracy and that the prosecutor and the police constable were committing perjury; the conduct of the defence may properly be taken into consideration.

The Lord Chief Justice: The appellant was convicted of doing malicious damages to trees growing in a garden to the extent of £2 7*s*. 6*d*., and was sentenced to four months' imprisonment with hard labour. It is a curious case. The appellant and the prosecutor were neighbours, and in May, 1913, some of the prosecutor's trees were seriously injured. He offered a reward of £5 for the detection of the offender, and passed a considerable part of his nights watching for him; he also bought silent boots to enable him to catch him. On the 13th December, at 8.30 p.m., he came up in these silent boots and found the appellant cutting a yew tree in his, the prosecutor's, garden. It is sufficient to say that the injury done was so serious that it

caused the trees to die. When the case was tried the appellant insisted that there was a plot on the part of the prosecutor and a police officer to convict him of an offence of which he was not guilty. This was set up, not in answer to questions in cross-examination, but as part of his own statement of the facts, and contrary to the view of his own counsel. He went into statements of this character in some detail. The jury convicted him on the evidence. We are loth to interfere with a sentence unless we come to the conclusion that it is one which no judge ought to have passed. We think that in this case the four months' imprisonment must stand, but having regard to the character of the offence and the reputation of the appellant, it will be sufficient to order it to be in the second division: we reduce the sentence accordingly.

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CHARLES PEDDAY.

Reading
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Sentence varied.

Solicitors for the Appellant—*Wellington and Clifford*, Gloucester.

A. L. B. T.

JOHN STRATTON.

Police officers, in giving evidence of a prisoner's character after conviction, must distinguish carefully between information within their own knowledge and information supplied to them, and between statements of fact and statements of opinion.

This was an appeal against sentence, by leave of the full Court. Appellant was convicted of burglary, at the Surrey Sessions, on the 7th January, 1914, and was sentenced to five years' penal servitude.

Appellant in person.

G. W. P. Swinburne for the Crown was not called upon.

A police-sergeant of the Leeds City Constabulary was called into the witness-box by the Court and asked to explain a statement made by him in giving evidence of character after the

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JOHN STRATTON.

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appellant's conviction. The nature of the statement and the explanation given appear from the judgment.

The LORD CHIEF JUSTICE: The appellant was convicted of burglary and sentenced to five years penal servitude. He applied for leave to appeal against sentence, and Horridge J. referred the matter to the Court because of the statement made by the police-sergeant, to which his attention had been drawn by the appellant. We came to the conclusion that the proper course would be to ask the police officer to attend, and to offer some explanation or justification of the statement, which was: "The prisoner was not known in England prior to his arrest at Leeds; from the report we got back from the Metropolitan Police of Dublin he was a most dangerous criminal, a man that always goes about fully armed." It appears, now that we have heard the police-sergeant, that no report had been received from the Metropolitan Police of Dublin; that was a mistake. He explains that he meant a report from the Metropolitan Police of London, which report consisted of a list of the appellant's previous convictions only. There was nothing in the report, except the appellant's record, to justify the statement, and nothing in those convictions to justify the remark that he was a man that always went about fully armed. It appears that the police officer did know that the appellant had been found under the bed in a house with a hatchet, and the view he took was that the appellant had the hatchet for the purpose of defending himself if necessary. To that extent he is entitled to express his opinion on the facts within his knowledge; but that is no justification for the statement he made. We feel it our duty to report the matter to the sergeant's superior officer, so that he may make such inquiries and take such steps as he may consider necessary. Certainly a police officer ought to be most careful in his statements, and the view of judges is that, speaking generally, they are careful. No doubt the sergeant did not intend to say that the statement was in the written report, but the statement went much further than anything for which justification could be found in the documents, and in these circumstances the Court thinks it right to make these observations in order that there may be precision and accuracy in statements made to the Court by the police.

Dealing with the appeal, it appears that it was a serious offence,

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and that the appellant has already undergone a sentence of penal servitude. It seems from all that was disclosed at the trial that he is an expert burglar, and a dangerous person in the sense that he is able to commit burglaries with great skill. He has four previous convictions, and we are not prepared to say that the sentence was too severe.

Appeal dismissed.

A. L. B. T.

MARY PRIESTLEY (*a*).

Appeal suggested by the Court.

This was an appeal against conviction and sentence, by leave of Horridge J. Appellant was convicted of larceny from the person, at the Bradford City Sessions, on the 14th January, 1914, and was sentenced to four months' imprisonment with hard labour.

Appellant in person.

Charles Mellor for the Crown. The case against the appellant was weaker than that against Reynolds, whose conviction was quashed by the Court last week. I do not propose to argue in favour of the conviction being upheld.

The LORD CHIEF JUSTICE: The appellant was convicted on an indictment charging her with larceny from the person in company with Reynolds and Jackson. The Court dealt last week with the case of Reynolds, and came to the conclusion that there was no evidence on which she could be convicted; we therefore quashed her conviction. The Court then said that, although the appellant had not appealed, she might still give notice of appeal, and that, the case against her being weaker than that against Reynolds, her appeal would be favourably considered. Notice of

(*a*) See above, p. 28.

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MARY PARKINSON.

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appeal having been given, the matter is now before us in correct form. Mr. Meller very properly says that he does not wish to argue in favour of the conviction being upheld, and says that it is evident that the Recorder thought that she ought to be acquitted. Accordingly, the Court quashes the conviction.

Conviction quashed.

A. L. B. T.

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ARTHUR JAKEMAN.

When in an indictment for obtaining by false pretences, one of the pretences alleged is that defendant was carrying on a genuine business, the mere fact that he has not in his possession goods which he advertises for sale does not establish the falsity of that alleged pretence.

This was an appeal against conviction on a point of law, and an application for leave to appeal against sentence and to call further evidence. Appellant was convicted of obtaining a cheque for £7 by false pretences, at the Lincolnshire Sessions, holden at Lindsey, on the 9th January, 1914, and was sentenced to eighteen months' imprisonment with hard labour.

Monier-Williams for the appellant, who was present. The facts in this case are that about the 23rd August the appellant inserted the following advertisement in the "Small Holder":—"Six strong store pigs £7 10s. Five larger £7. Selected gilts 30s. to £2. Jakeman, 7, Kimberley Road, Fleetville, St. Albans." The prosecutor, one Robinson, replied to it, and received in reply the following undated letter from the appellant:—

"Dear Sir,

The five pigs are between three and five months old, about 14 weeks. Breed large white and Berkshire cross, but I have also middle white and Berkshire selected gilts of any of these breeds, same age as above 30s., older at 35s. and £2 each. Quickly despatched in crates to be returned. I sell a lot of pigs and so it is to my interest to satisfy my customers."

On the 25th August Robinson sent the appellant a cheque

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for £7, although he had not been asked for payment, as purchase-money for the five pigs advertised. The appellant answered that he would apply for a licence and send the pigs as quickly as possible. On the 17th September he wrote that he had been unable to send the pigs before because they had been moved; this was untrue. There was further correspondence, and on the 27th November Robinson obtained a summons against the appellant. As soon as he received it the appellant wrote to say that he had been unable to get the pigs required, and returned the money. He thought then that the matter was ended, but the summons was not withdrawn, and as he did not appear a warrant was issued for his arrest. I do not think he ever understood the nature of the charge; he made no defence before the magistrates beyond saying that he had no intention to defraud. He was committed for trial on the 23rd December, and later the vicar of his parish interested himself in the matter, but solicitors were only instructed on the 8th January, the day before the trial, when it was too late to get evidence or go into the matter fully.

The appellant is in the habit of driving round the district selling poultry, &c., and in this way knows where there are pigs for sale, and he has sold many pigs in this way. He never brings them on to his premises, because, if he did so, under the swine-fever regulations, he would have to keep them there for twenty-eight days before they could be moved again. A pig register was produced which shewed several *bonâ fide* dealings in pigs, and that they were sent direct to the purchasers from the farmers.

I complain of the way in which the Chairman conducted the case, and of his summing up; it was obvious that he took a strong view against the appellant, and that he was of opinion that the advertisement meant that the appellant had pigs on his premises or which he could deliver. It might mean merely an offer to sell at a certain price. The Chairman constantly interposed with remarks, the effect of which was that if the jury had a grain of common sense they would come to the conclusion that the advertisement meant that the appellant had the pigs. His summing up was to the same effect; he said: "Now, gentlemen, I will ask you, twelve men of ordinary common sense, what you would think of an advertisement of that description. Would you think it was an advertisement that these pigs could be produced from somewhere or another, or would you think it was the advertisement

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of a man who actually had these pigs, either in his own possession, or under an option which he was able to exercise over them?" and "He cannot say that the advertisement is a true advertisement. It is for him to shew that it is if he can under the circumstances." That was putting the burden of proof on the defence instead of on the prosecution. But the indictment did not allege as one of the false pretences that the pigs were on the premises; the false pretences set out in the indictment were that he carried on a *bonâ fide* business as a pig-dealer, and that in the ordinary way of trade he had for sale five pigs, and was able to supply them. These false pretences were never put to the jury by the Chairman. In *Ward*, 62 J. P. 475 (1898), the case turned on an advertisement in almost precisely similar terms, and Hawkins J. said he could see no evidence of any intention to defraud.

I ask leave to call a farmer named Anstee, who had pigs answering to the description in the advertisement which the appellant tried to bespeak long before the summons was issued; he will explain why he would not let him have the pigs; also witnesses to prove that the appellant was carrying on a genuine business as a pig-dealer.

The Court gave leave for the evidence to be called, and the case was adjourned for that purpose.

George Anstee called, said: I am a breeder of pigs, and have known the appellant for three years as a dealer in eggs, poultry, &c. He began last April to buy pigs from me; I sold him between sixty and seventy between April and September, 1913. In August I had some pigs of three months old; the appellant was always wanting them; he had a standing order for pigs from me. In October I had thirteen pigs, which he had bespoken; originally for Burrowes, of Barnsley, but he could not take them all; then the appellant bespoke them for Robinson. In the middle of October I visited him, and he filled out a paper for the movement of pigs (produced). It related to my pigs which were to go to Robinson. I did not send them as the appellant owed me money on another deal. He could have had them at any time by paying for them. Dealers like the appellant never take pigs on their premises because of the swine fever regulations.

Cross-examined by *Sandlands* for the Crown. Pigs were scarce last summer; persons advertising pigs would be taken to mean

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ready for delivery. Unless they had been previously bespoken there would be a difficulty in procuring any. The appellant relies on me to supply his customers. It was not true to say that I would not sell the pigs to him at the end of August because I had sold them to someone else.

Re-examined: The appellant had promised to send pigs to a Mr. Sheard, and he gave me a cheque for £10 (produced). Payment of the cheque was stopped because the pigs were not sent soon enough. He was going to pay out of that cheque the amount owing to me.

Alfred Park called, said: I am the landlord of the Chequers Inn, Gaddesden, Hertfordshire. I have known the appellant for two years. I sold him seven store pigs in August and seven more in September.

Cross-examined: These pigs were sent direct by me to the appellant's customers.

Sandlands for the Crown. The additional evidence proves the guilt of the appellant; it is a different story from that told at the trial. He then said that the pigs had been sold to excuse the non-delivery to the prosecutor. As it appears from Anstee's evidence that he could at any time between August 27th and October have sent the pigs, it is obvious that he intended to defraud the prosecutor. The false pretences are contained in the advertisement and the letter read together; they must mean that he had the pigs available for sale. The case for the prosecution was that the appellant did engage in some honest dealings, which were used as a cloak for proceedings such as these. I cross-examined him as to many complaints, and we proved one case in March last, when a cheque was sent for pigs which were never delivered, and the money was not refunded until three months later, after the police had been approached.

The LORD CHIEF JUSTICE: The appellant was convicted of obtaining a cheque for £7 by false pretences, and the appeal comes before us on a question of law, and there is also an application to call further evidence. It appears that the appellant advertised in a paper called the "Small Holder" in these words: "Six strong store pigs £7 10*s*. Five larger £7. Selected gilts 30*s*. to £2.

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Jakeman, 7, Kimberley Road, Fleetville, St. Albans." There was correspondence between him and Robinson, the prosecutor, in answer to whose inquiry this letter was written by the appellant; and it is from the advertisement and the letter together, coupled with the other facts in the case, that it is said that the false pretences have been proved.

"Dear Sir,

The five pigs are between three and five months old, about 14 weeks. Breed, large white and Berkshire cross, but I have also middle white and Berkshire selected gilts of any of these breeds, same age as above 30*s*., older at 35*s*. and £2 each. Quickly despatched in crates to be returned. I sell a lot of pigs and so it is to my interest to satisfy my customers."

Robinson sent a cheque for £7 to purchase some of these pigs on the 25th August, and finding that he did not get the pigs and that the money was not returned, he issued a summons on the 27th November, charging the appellant with obtaining the cheque by false pretences. During the interval letters had passed which it is unnecessary to read, the substance of which was a demand for the pigs or the money. The case presented by the prosecution was that the £7 had been obtained by the appellant by one of three false pretences, which are the false pretences set out in the indictment; and it is well to observe that some attention should be directed to the false pretences in the indictment when the case is tried. The false pretences alleged were that the appellant was carrying on a *bonâ fide* business as a pig-dealer, that he had for sale in the ordinary and legitimate way of trade five strong store pigs, and that he was then able to supply to Robinson five pigs between three and four months old of large white and Berkshire cross breed. In order to support the conviction there must be evidence which the jury could accept that the appellant made one or more of these false pretences. We cannot help thinking that during the case the first false pretence was somewhat lost sight of. It appears from the questions and observations of the Chairman that the view formed by him of the advertisement was that it was apparent and self-evident—and that if anyone thought differently he was of a low order of intelligence—that the statement meant either that the appellant had the pigs in his possession or under his control, in the sense that he had an option

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on pigs answering to the description given. In our opinion it is quite wrong to say that that is the only sensible view. It was quite open to the jury to find that the advertisement meant that he was ready to supply pigs of that description; but that view was never presented to the jury as an alternative.

It is very important to bear in mind that at the root of the charge of the Chairman to the jury lies the opinion which he had formed that the appellant was not in fact carrying on a *bonâ fide* business as a pig-dealer. If the answer to that question is in the affirmative, it seems to us that it has a very important effect upon the issue as to the other two false pretences. If he was carrying on such a business, it is immaterial whether he had the pigs in store or under his control. We feel convinced that if the jury had heard the evidence that we have heard to-day from Anstee they would never have come to the conclusion that the money had been obtained by false pretences. We see no reason to disbelieve any of the evidence of Anstee, which was given in a way which commended itself to the Court. The conclusion is irresistible from the fact that between April and September, 1913, the appellant bought between sixty and seventy pigs from Anstee. The pig register further shews a number of transactions between July and October in which the appellant was engaged as a pig-dealer: these are *bonâ fide* transactions which have not been impeached before us. In order to avoid the difficulties that arise under the swine fever regulations from having pigs on the premises, the practice is for the seller to give the customer's address to the farmer, and for delivery to be made direct. It has been established to our satisfaction that that is the usual and reasonable course. Therefore, it seems to us that it is impossible to allow this conviction to stand, and the appeal is allowed.

Conviction quashed.

Solicitor for the Appellant—*T. Ottaway*, St. Albans.

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A defendant who has not given evidence on his trial will not be allowed to do so on appeal.

The issue whether a husband is "about to leave or desert his wife" within s. 12 of 45 & 46 Vict. c. 75, the Married Women's Property Act, 1882, depends on the circumstances of each case, and is for the jury.

Whether "they are living together" at a particular date is a question for the jury (on which, semble, *they should be directed).*

Proviso to s. 4 (1) of the Criminal Appeal Act, applied, notwithstanding improper reception of evidence and misdirection.

This was an appeal against conviction on a point of law, and an application for leave to appeal against sentence. Appellant was convicted of larceny, at the West Riding Sessions, on the 10th January, 1914, and was sentenced to six months' imprisonment with hard labour.

H. R. Bramley for the appellant, who was not present. The appellant was convicted of stealing furniture to the value of £30 from his wife, under the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 12, which enacts that "Every woman . . . shall have in her own name . . . (subject, as regards her husband, to the proviso hereinafter contained) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a *feme sole*. . . . Provided always, that no criminal proceeding shall be taken by any wife against her husband by virtue of this Act while they are living together, as to or concerning any property claimed by her, nor while they are living apart, as to or concerning any act done by the husband while they were living together, concerning property claimed by the wife, unless such property shall have been wrongfully taken by the husband when leaving or deserting, or about to leave or desert his wife." The facts in the case are not in dispute; the parties were married on the 20th February, 1913, and they lived together until the 8th September, when the wife was not well and went to live in her parents' house. The appellant joined her on the 12th September, and lived with her there until the 15th November. Between the 27th September and the 1st October

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the appellant sold all the wife's furniture, and she said he had no authority to do so, and that it was against her wishes. No evidence was called by the prosecution to shew that the appellant at the time of the sale of the furniture had any intention of leaving his wife. She herself gave evidence that the appellant with her consent took two other houses, and that she was making preparations to live at one of them. (He was stopped on this point.)

Yarborough for the Crown. It was only necessary for the prosecution to prove that the appellant dealt with the wife's goods in circumstances which would amount to larceny if she were a *feme sole*. It was then open to the defence to prove, if possible, facts which brought him within the proviso, and the burden was on the defendant: *James*, [1902] 1 K. B. 540; 71 L. J. K. B. 211; 86 L. T. 202; 50 W. R. 286; 66 J. P. 217; 20 Cox C. C. 156; C. C. R.

Bramley. *Audley*, [1907] 1 K. B. 383; 76 L. J. K. B. 270; 96 L. T. 160; 71 J. P. 101; 23 T. L. R. 211; C. C. R., is a later case on the point. Both these decisions rested on the necessary averments to be contained in the indictment in question, the essential ingredients of the offences charged being clearly established by the evidence for the prosecution in each case, and in *James* certain passages in the judgment are inconsistent with the *onus* being upon the defence in the circumstances proved in this case. Here the witnesses for the prosecution themselves proved the defence; the wife proved that they lived together for six weeks after the offence. In *Payne*, [1906] 1 K. B. 97; 75 L. J. K. B. 114; 94 L. T. 288; 54 W. R. 200; 70 J. P. 28; 21 Cox C. C. 121; 22 T. L. R. 126; C. C. R. although *James* was followed, Channell J. threw doubt upon the decision; he said: "I would, however, venture to suggest that in drawing an indictment in future for receiving property stolen by a wife from her husband, it would be better to allege that the property stolen belonged to the husband, and was stolen from him by the wife."

It could not be held that the appellant was "about to desert" his wife when he lived with her for six weeks afterwards: see *Bentsen* v. *Taylor Sons & Co.*, [1893] 2 Q. B. 274; 62 L. J. Q. B. 516; 4 R. 508; 69 L. T. 333; 41 W. R. 593; C. A., where the

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expression "about to sail" was held to mean just about to sail if the ship was loaded; or, if not loaded, that she would be loaded in a day or two and would then sail. See also *Lemon* v. *Simmons*, 57 L. J. Q. B. 260; 36 W. R. 351 (1888), where Manisty J. held (at p. 263) that in a slander action by a husband against a third party, where the words complained of were merely that he had taken £75 of his wife's money, the plaintiff, to succeed, would have to make out that the innuendo was that he took the money with the immediate intention of leaving his wife. Otherwise the words complained of imputed no indictable offence.

[The LORD CHIEF JUSTICE: That case is of no value in view of the decision of the Court of Crown Cases Reserved in *James*.]

In *James*, that case was referred to in the judgment, and held to be not inconsistent with the view there expressed.

There was no intention on the part of the appellant to leave his wife. Such an intention is not to be presumed from the mere fact that he has wrongfully taken his wife's property. If, *e.g.*, whilst living with her, he takes and pawns her jewellery, without her knowledge or consent, solely in order to raise money, he commits no offence against the statute. He did not give evidence at the trial, as I relied on the point that the *onus* was on the prosecution, but I ask leave to call him now.

[The LORD CHIEF JUSTICE: That is impossible; he might have been called at the trial.]

Even now the appellant has not deserted his wife. He is a peripatetic labourer, whose work takes him to different places. After working for four days at one place he was arrested.

The Chairman misdirected the jury on these questions.

Inadmissible evidence was given by the wife that she had been induced by the appellant's fraud to sign a promissory note; that occurred before the marriage. This evidence was not objected to at the trial because her depositions only alleged lack of knowledge on her part. The charge of fraud came as a complete surprise, and the jury should have been warned to disregard it. She also said

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that there was a warrant out against him for selling other furniture which he had obtained on the hire purchase system.

BANKES J.: The appellant in this case appeals against his conviction, alleging that as a matter of law he was entitled to be acquitted on a charge brought against him by his wife of stealing a quantity of furniture. The Married Women's Property Act, 1882, s. 12 provides that such a prosecution shall be possible, and that a married woman may take criminal proceedings against any person, including her husband, who steals her separate property, provided that in the case of a husband the provisions contained in the last part of the section are complied with. In *James's* case the question of the proper construction of this section came before the Court of Crown Cases Reserved, where it was decided that the latter part of the section is not in the nature of an exception, but of a proviso; so where a husband is prosecuted by his wife the *onus* is not on the prosecution to satisfy the jury that the case is not within the latter part of the section, but the accused may, by way of defence, prove facts which bring the case within the proviso.

The short facts in the case are that the appellant married the prosecutrix, who was a widow with two children, and who had a house full of furniture which was, apparently, of considerable value for a woman in her station in life. At the trial she said that she considered it her duty to maintain this furniture, and looked upon it in the light of provision for her children. After the marriage, which was in February, 1913, the parties lived together at a house to which the furniture was moved. The wife was in bad health, and on the 8th September she went to her parents' house, leaving the house locked up with the furniture in it. From about the 12th September until the 14th November she lived at her parent's house, her husband being away in the daytime, but joining her every night. It appeared that in the latter part of September, down to and including the 1st October, the appellant was engaged in making away with the whole of the furniture, which he sold, and the proceeds of which he pocketed. By the 1st October the whole of it had been disposed of. The wife did not know of this until a considerable time after. The appellant ceased to reside with her, in the sense that he discon-

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tinued his visits at night, on the 15th November. Then inquiries were made, and his wife found out what had happened; and on the 19th November a warrant was issued for his arrest.

The section of the Married Women's Property Act, 1882, makes the time which it is material to consider the time at which criminal proceedings are taken; and the first question that arises is whether at that time the parties were living together, because if so it would be a complete defence. If they were not, and the act complained of was committed while they were living together, the question arises whether the property was taken by the husband when leaving or deserting, or about to leave or desert his wife. The facts are not in dispute, as regards the appellant's movements, or that after the 15th November he ceased to reside with his wife. It is true that the Chairman did not direct the jury upon the question whether the parties were living together on 19th November, the date when the wife took proceedings, but no point seems to have been made of this at the trial, and the Chairman was in our opinion upon the facts justified in treating the matter as he did.

Then it is said that the Chairman misdirected the jury on the other part of the case, as to whether when the appellant dealt with the furniture he was about to leave or desert his wife. Counsel has referred to a number of authorities which, in relation to quite different circumstances, have dealt with the word "about." The word has no special legal meaning, but its meaning must have reference to the particular subject-matter and the circumstances of the case. It is also said that there was no evidence that the appellant was about to leave his wife. Some things speak for themselves. The whole circumstances were before the jury; the position in life of the parties, the amount and value of the furniture and the circumstances in which it was disposed of; there was also the fact that the prosecutrix valued it and looked upon it as provision for her children. Having all these matters in their minds it was open to the jury to find that the appellant must have known that the moment his wife found out what he had done their future living together was impossible, and that he must leave or desert her. The jury were justified in finding that the wife must find out shortly what had happened. They were therefore abundantly justified in finding that the appellant was about to leave her.

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It is also said that evidence was wrongly admitted. It was not objected to at the trial; if it had been, in the opinion of the Court, it ought not to have been admitted; but that could not have affected the result. The appeal is therefore dismissed.

Appeal dismissed.

Solicitor for the Appellant—*W. Lindsay Crawford,* Doncaster.

A. L. B. T.

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BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BANKES AND MR. JUSTICE AVORY.

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JOHN THOMPSON PARKS.

On an indictment for wounding with intent to murder, the jury should be directed in a proper case that they were entitled to find a verdict of unlawful wounding.

This was an appeal against conviction and an application for leave to appeal against sentence. Appellant was indicted for wounding with intent to murder, but was convicted of wounding with intent to do grievous bodily harm, on the 27th November, 1913, at the Leeds Assizes, before E. A. Mitchell-Innes K. C., sitting as Commissioner, and sentenced to twelve months' imprisonment with hard labour.

One George Henry Potts climbed up a ladder to a window in the appellant's house, where he suspected his wife to be with the appellant. It was a moonlight night, but the room was dark. Potts was standing on the ladder with head and shoulders above the level of the window-sill. He tapped the window with his knife by way of asking to be admitted. The appellant, who was used to firearms, discharged a twelve-bore shot-gun through the window at a distance of about 6 feet from the prosecutor. The evidence shewed that at the moment of the discharge the prosecutor, who said he saw the flash, dropped his head. Some of the pellets glanced off the glass and struck the prosecutor. The appellant was charged as above set out, and the defence was that he only intended to frighten the prosecutor by firing through the window.

V. B. Mockett for the appellant (under s. 10 of the Criminal

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Appeal Act). The learned Commissioner did not properly direct the jury in that he asked them whether the shot was fired directly at the man, and whether he was able to get out of the way owing to seeing the flash of the gun. That was to suggest an impossibility. It was not possible for anyone to see a flash and move out of the way in time to avoid being hit. If the gun was aimed direct in the first place it must have hit the prosecutor directly and not merely by glancing off the window.

[Avory J.: The shots that were taken from the man's head were only just below the skin, which is quite inconsistent with it being a direct shot, and shews that it must have been a ricochet.]

I submit that the following words were a misdirection: "If you think that this man really shot carefully to avoid hitting this man and that it was mere accident that the shot hit him at all, there is still a difficulty in your way of acquitting him, because, as I have said, a man in the eyes of the law must be taken to know the natural consequence of his act, and I am quite sure you are too sensible to say that a man can fire at six feet off a glass on the other side of which is a man looking through without expecting to hit him in some way." The learned Commissioner then directed the jury that if they thought appellant only fired to frighten the prosecutor they could find him guilty on the second count of wounding with intent to do grievous bodily harm.

A. S. Comyns Carr for the Crown. The jury could hardly have failed to come to the same conclusion if properly directed.

The LORD CHIEF JUSTICE: The appellant was convicted of wounding with intent to do grievous bodily harm and sentenced to twelve months' hard labour. It is not necessary to set out the facts. The learned Commissioner evidently had not in his mind that the jury were entitled to find a verdict of unlawful wounding upon this indictment. We think that if there had been a proper direction the jury might have found such a verdict. If such had been the finding no doubt the sentence would have been less than it was. It is, however, a serious offence. The sentence will

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be reduced to one of six months' imprisonment with hard labour, and a verdict of unlawful wounding substituted for that of wounding with intent to do grievous bodily harm.

Verdict varied: Sentence reduced.

C. St. J. W. N.

PETER MALOY.

The Court will correct a sentence due to a mistake in the record.

This was an appeal against sentence. Appellant was convicted on the 9th January, 1914, at the Sunderland Borough Sessions, of attempted larceny from the person, and sentenced to three years' penal servitude.

Comyns Carr for the Crown. I agree that the sentence cannot be supported.

The LORD CHIEF JUSTICE: Prisoner was found guilty of the attempt only, but the record as drawn up states that he was guilty of the felony. The record must be corrected to accord with the verdict of the jury. The sentence of three years could not have been passed if this mistake had not been made, and will be reduced to one of twenty months' imprisonment with hard labour.

Record amended: Sentence reduced.

C. St. J. W. N.

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S. 17 (1) *of* 42 *&* 43 *Vict. c.* 49, *the Summary Jurisdiction Act*, 1879, *does not apply to incorrigible rogues committed under s.* 5 *of* 5 *Geo.* 4, *c.* 83, *the Vagrancy Act*, 1824: *it only applies to persons "liable on summary conviction to be imprisoned for a term exceeding three months." Persons liable to be committed as incorrigible rogues cannot claim to be tried by a jury.*

These were appeals against sentence. The appellants were convicted of being incorrigible rogues, and sent to the Hereford City Quarter Sessions for sentence, and on the 23rd of October, 1913, they were sentenced respectively to nine months' and six months' imprisonment with hard labour.

W. H. Riley-Pearson for the appellants, who were present. These are appeals under s. 20, sub-s. 2, of the Criminal Appeal Act. The question is whether the appellants are offenders who were liable on summary conviction to be imprisoned for a term not exceeding three months within s. 17, sub-s. 1 and 2, of the Summary Jurisdiction Act, 1879, and therefore entitled to claim to be tried by a jury. Prisoners were convicted under the Vagrancy Act, 1824, of being incorrigible rogues, and committed to prison with hard labour until the next quarter sessions, there to be sentenced. Is this a term of imprisonment which may last longer than three months within the meaning of s. 17—seeing that a Recorder may hold his sessions at an interval of six months (less two days)? *Beesley and Others*, [1909] 1 K. B. 849; 78 L. J. K. B. 482; 100 L. T. 486; 73 J. P. 234; 22 Cox C. C. 47; 53 S. J. 289; 25 T. L. R. 337—Q. B. D.; shews that where the prisoner is in peril of imprisonment for more than three months he must be given the opportunity of being tried by a jury. But this case was not under the Vagrancy Act.

Comyns Carr for the Crown was not called on.

AVORY J.: The appellants were convicted under s. 5 of the Vagrancy Act, 1824, as incorrigible rogues. They were committed to the next quarter sessions. That means that the magistrates, having convicted them as incorrigible rogues, send

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them to the next quarter sessions to pass sentence upon them. In the opinion of the Court the justices do not pass a sentence at all, but commit them to the quarter sessions to be there dealt with. The Act provides that persons so convicted shall be kept to hard labour. That is a mere provision for their safe custody and useful employment. In s. 17 of the Summary Jurisdiction Act, 1879, the words are "liable on summary conviction." Having regard to the decisions in *Beesley and Others* and other cases under the same section, including the case of *John Lake*, 46 J. P. 88 (1882); and *Carle* v. *Elkington*, 56 J. P. 359; 67 L. T. 374; 40 W. R. 510; 17 Cox C. C. 557 (1892); Q. B. D.; the true construction of this section appears to be that it only applies to cases where upon summary conviction the magistrates have power to sentence the offender there and then to imprisonment for more than three months.

Appeals dismissed.

Solicitors for the Appellants—*Philip Baker & Co.*, Birmingham.

C. St. J. W. N.

JOHN MOORE.

Whether a particular incident in the play of the "three card trick" is "a fraud or unlawful device or ill practice" within s. 17 of 8 & 9 Vict. c. 109, the Gaming Act, 1845, is a question for the jury, provided that the cheating alleged must take place during the play.

Evidence that immediately after prosecutor complained of being defrauded a stranger gave him money is admissible as part of the res gestæ.

This was an appeal against conviction and sentence. The appellant was convicted, before the Deputy-Chairman, at the County of London Sessions, on the 23rd January, 1914, of obtaining by false pretences £2 with intent to defraud, and sentenced to nine months' imprisonment with hard labour.

The prosecutor, an Austrian, with a friend were passengers in a train going to Waterloo Station. At Clapham Junction the prisoner and three other men got into the carriage in which were the prosecutor and his friend. On the way some of the men started playing the three-card trick, and the prisoner urged the prosecutor

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to make a bet, pointing out that the corner of one of the cards was turned up which rendered it certain that he would win. The prosecutor allowed himself to be persuaded and lost £2. The train then arrived at Waterloo, and as they were leaving the carriage the prosecutor or his friend mentioned the police, and the four men scattered. The prisoner was caught while hastily leaving the station. He was not stopped until he had got forty yards away. By this time the other three men were nowhere in the vicinity. At this moment an entirely different person, whom the prosecutor had never seen before, came up to him and gave him £2.

Wickham for the appellant. The evidence with regard to £2 being handed back to the prosecutor was not admissible. The prosecutor was not defrauded by any false pretence, but by taking advantage of one of the cards being marked by having the corner turned up, was himself not playing the game fairly. Lastly, the prosecutor so contradicted himself in giving evidence that the conviction could not safely be allowed to stand.

Dillon for the Crown was not called on.

Hawtin, as *amicus curiæ*, referred to *Governor of Brixton Gaol, Ex parte Sjoland*, [1912] 3 K. B. 568; 77 J. P. 21, 22; 82 L. J. K. B 5; 29 T. L. R. 10; K. B. D.

The LORD CHIEF JUSTICE: Two points are taken for the defence; first, that at the trial evidence was admitted that after the prosecutor caused the appellant to be arrested a sum of £2 was brought to the former by someone who had not been in the train. We have come to the conclusion that the evidence was admissible; it related to part of the *res gestæ*, and an inference might fairly be drawn from it. Nor do we think that the admission hurt the appellant's case. Then it is urged that there was no false pretence because the prosecutor was warned that he might be defrauded, but this only shews that the prosecutor had grounds for suspicion. Further, it is said that there was not an "unlawful device" or an "ill practice" within s. 17 of the Gaming Act of 1845. The substance of this issue was put by the Deputy-Chairman when he said that the jury were entitled to consider the matter of the turned up card, and if they thought that the game

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was fairly played or had any doubt about its unfairness, they must find for the defendant. The *Governor of Brixton's* case, cited by Mr. Hawtin, decided that the false representation must be in connection with the game itself. The jury evidently thought that turning up the end of the court card was an ill-device by which the prosecutor was induced to part with his money, and we are of opinion that there was evidence before them upon which they could come to this conclusion.

Appeal dismissed.

Solicitors for the Appellant—*Walton and Hurd.*

C. St. J. W. N.

WILLIAM HILL.
FRANK CHURCHMAN.

The charge of living on the earnings of prostitution is triable at Quarter Sessions.

An indictment charging such an offence on one day only is good.

The ordinary rule as to proving system applies to evidence of that offence being committed on other days than on the particular one charged.

These were appeals against conviction on the certificates of the Recorder who tried the cases. Appellants were convicted separately by different juries of living on the earnings of prostitution, at the Portsmouth Borough Sessions, on the 12th January, 1914: sentences were postponed.

Hill was indicted in four counts: (1) living wholly on the earnings of one woman on 21st November, 1913: (2) living in part on the earnings of the same woman on the same day: (3) living wholly on the earnings of another woman on the same day: (4) living in part on the earnings of the same woman on the same day: the prosecution went to the jury on one count only—for "living in part," &c., and appellant was only convicted on that count.

Churchman was indicted in two counts: (1) for living partly on such earnings on 8th November, 1913, and on other days

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between 8th November and 22nd November: (2) for doing so "wholly" in respect of the same woman on and between the same dates.

Both appellants had been previously convicted of the same offence.

John Harris for the appellants (under s. 10 of the Criminal Appeal Act). My submission is that the Court of Quarter Sessions had no jurisdiction to try these cases. The offence of living on the earnings of prostitution was formerly dealt with under the Vagrancy Act, 1898 (61 & 62 Vict. c. 39), s. 1, under which Act a person so convicted was to be deemed to be a rogue and vagabond within the Vagrancy Act of 1824 (5 Geo. 4, c. 83), and dealt with accordingly. The Act of 1824 prescribed a special method of procedure before a Court of summary jurisdiction, and trial by indictment was thereby excluded. A prisoner who had been twice convicted as a rogue and vagabond could be sent to Quarter Sessions for additional punishment, but this was the only right which Quarter Sessions had of dealing with this offence. They had no jurisdiction to try. Sub-s. 2, s. 7 of the Criminal Law Amendment Act of 1912 (2 & 3 Geo. 5, c. 20) takes away this right expressly, and Quarter Sessions are therefore left with no jurisdiction at all. Sub-s. 5, s. 7 of that Act makes the offence indictable, but having taken away the only jurisdiction which Quarter Sessions possessed, the legislature, if it had intended to confer jurisdiction to try, would have expressly made the offence triable at Quarter Sessions. Moreover, s. 9 of the Act of 1912 implies that the Act is to be read together with the Criminal Law Amendment Act of 1885, which expressly provides that no offence under it (and it deals with offences of a similar nature) shall be triable at Quarter Sessions.

The indictment in Hill's case was bad, and ought to have been quashed on two grounds: (1) it charges no offence on its face for which a jury could reasonably convict; (2) it is inconsistent and repugnant to itself.

(1) The offence aimed at by the statutes is the pursuit of a particular mode of life. The words by which it is described connote habit and a continuous course of conduct. To charge a man with living on the earnings of prostitution on one day is absurd. "Living" cannot be judged by the acts of one day.

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WILLIAM HILL.
FRANK CHURCHMAN.

Reading L.C.J.
Bankes J.
Avory J.

If the evidence were confined to the acts of one day, no jury could convict. In these cases evidence of acts extending over a period is necessary. The offence is analogous in that respect to that of keeping a bawdy house or carrying on an offensive nuisance. The indictment should therefore be in the form given in *Archbold* (p. 1323) for keeping a bawdy house. Upon an indictment which charges the offence on one particular day, the prisoner is embarrassed in his defence if evidence of acts upon other days is admissible. Such evidence was in fact given in this case, but is inadmissible upon an indictment in the present form.

(2) The indictment charges the prisoner in the first count with living wholly on the earnings of prostitute A. on one particular day. In the third count it charges him with living wholly on the earnings of prostitute B. on the same day. The two counts are mutually exclusive and inconsistent, and the indictment is therefore repugnant and bad.

Du Parcq for the Crown in Hill's case,

Horace Fenton for the Crown in Churchman's case were not called on.

BANKES J.: First, as to jurisdiction, it is argued for appellant that the Criminal Law Amendment Act, 1912, "impliedly" ousts the jurisdiction of Quarter Sessions. We do not agree with that contention. Sub-s. 5 of s. 7 of the Act of 1912 substitutes a new procedure for the old procedure under the Vagrancy Act, but does not either expressly or impliedly take away the jurisdiction of Quarter Sessions. It is further contended that because under s. 9 of the Act of 1912 it is provided that the Criminal Law Amendment Act, 1912, and the Criminal Law Amendment Act, 1885, "may be cited together as the Criminal Law Amendment Acts," and because offences under the 1885 Act are not triable at Quarter Sessions, therefore offences under the Criminal Law Amendment Act, 1912, are not triable at Quarter Sessions. In our judgment that contention is not well founded.

Further objections are taken which apply to Hill's case only: It is said that the indictment is bad because it charged the appellant with living on the earnings of prostitution on a day named, and not on divers days. It is also said that evidence is not admissible on the indictment as laid of anything done on any day,

except the day named. In our opinion there is no substance in either objection. The question being whether on the day named the appellant was living on the earnings of prostitution, it is clearly relevant to ascertain what his relations with the woman in question had been either before or after the day named in the indictment, in order to determine whether he was or was not living on the earnings of her prostitution on that particular day.

A further point is taken that the indictment is bad because it contains inconsistent counts, viz.: one charging the appellant with living wholly on the earnings of prostitute A. on a day named, and another charging him with living wholly on the earnings of prostitute B. on the same day. As to that, it is sufficient to say that the appellant was not convicted of living wholly on the earnings of two different prostitutes on the same day.

Appeals dismissed.

C. St. J. W. N.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING AND MR. JUSTICE CHANNELL.

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JAMES HONEYANDS.

Murder.

A judge is not bound in law to put to the jury any particular defence set up if he thinks that the facts proved do not in law make out that defence.

This was an application for leave to appeal against conviction. Appellant was convicted of murder, on the 25th February, 1914, at the Exeter Assizes, before Mr. Commissioner English Harrison, and was sentenced to death.

J. G. Trapnell for the applicant (under s. 10 of the Criminal Appeal Act), who was not present. The appellant was convicted of shooting a woman named Amelia Bradfield in October last. There is no dispute that he shot at a girl with a revolver several times, and on the same day a girl was admitted to a hospital in the same town suffering from bullet wounds, from which she died ten days later, but there was no evidence to identify that girl with the girl who was shot at by the appellant.

The defence was that either the appellant was insane, or that, as a result of drinking, he was incapable of forming a murderous intention, and so could only be convicted of manslaughter. There was evidence of insanity in his family, and medical evidence to the effect that such a man would be more easily affected by drink. The Commissioner misdirected the jury by telling them, in effect that unless they found a state of mind that practically amounted to insanity they could not properly return a verdict of manslaughter. The proper direction, where the defence of drunkenness is raised in such a case, was laid down in *Meade*, (1909) 1 K. B. 895; 78 L. J. K. B. 476; 73 J. P. 239; 53 S. J. 378; 25 T. L. R.

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359; 2 Cr. App. R. 54. No direction was given here whether the appellant knew that what he was doing was dangerous; in fact, it was throughout a direction on insanity, and there was no direction on manslaughter at all. It is true there was evidence of threats, but as to two there was a conflict of evidence, and in one case it occurred, if at all, in July, which was too remote; the third threat was uttered when he was already under the influence of drink.

Dummett and *Jowitt*, for the Crown, were not called upon.

The LORD CHIEF JUSTICE: The appellant was convicted of the murder of Amelia Bradfield, and the case has been argued before us on his behalf by Mr. Trapnell with ability and ingenuity. We are asked to substitute a verdict of manslaughter for that of murder, and the main objection taken is that in his summing up the Commissioner did not indicate to the jury that they might find the appellant guilty of manslaughter, when it had been argued for the defence that they could return such a verdict.

The facts are very short, and are hardly in dispute. The appellant was a stoker in the Navy, and he appears on this particular day to have taken some drink. He had known the deceased for some months, and had expressed himself violently with reference to her. On the day in question he had asked her to meet him near the Courtney Arms, and she had done so. He had a revolver with him, which he had already fired once in the bar and once in the street in a wild sort of way without injuring, or intending to injure, anyone. In the public-house he said to the girl, "You'll be all right to-night; I'll do for you." She went out, and he followed soon afterwards, and shot straight at her at arm's length; she stooped, and he fired two more shots at her. He then ran away, and was followed by a postman; he pointed the revolver at the postman without firing, and then pointed it at his own head, but was stopped from firing it. On the way to the station, having said that she had given him a disease, he said, "I hope I have killed her." She was taken to the hospital suffering from five wounds caused by three cartridges; there was no evidence that she was suffering from any disease.

The defence was insanity; and it was further said that the

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appellant could stand very little drink, and that a small amount inflamed him, so that he did not know what he was doing. It was contended that he had no intention to kill the woman, and that, though falling short of insanity, he was not in a mental condition to form the intention. Mr. Trapnell relies on *Meade*. On analysis of the summing up, it is clear to us that the Commissioner was right in the view which he took, and in the direction that he gave. A judge who is trying a case of this kind is not bound in law to put a particular defence to the jury if he takes the view that that defence has not been made out, and that the facts do not amount in law to proof of the defence which is suggested. If he was bound to give any direction on this point, it would have been to tell the jury that the facts did not warrant a verdict of manslaughter. He did not do so; he treated the case as one where the appellant either was guilty because he formed the intention, or, because of his mental condition, was unable to form any intention. The sole question was whether the appellant was insane, or whether he knew what he was doing and so was guilty of murder. On the facts narrated, coupled with the statement which he made after arrest, it was impossible for any jury reasonably to return a verdict of manslaughter, and the appeal must be dismissed. We wish nothing that we have said to prejudice an appeal to the Home Secretary, the jury having made a strong recommendation to mercy.

Application dismissed.

A. L. B. T.

ERNEST WILLIAM LYDFORD.

The effect of s. 102 (1) *of* 8 *Edw.* 7, *c.* 67, *the Children Act*, 1908, *on s.* 4 *of* 24 *&* 25 *Vict. c.* 96, *the Larceny Act*, 1861, *is not to abolish the sentence of whipping on a male under the age of fourteen.*

The duty of executing such a sentence is upon the sheriff, who may delegate such duty.

The Sheriffs Act, 1887 (50 *&* 55 *Vict. c.* 55), *is not exhaustive of a sheriff's powers and duties.*

This was an appeal against sentence on a case stated by Scrutton J. Appellant was convicted of larceny, at the Hereford

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ERNEST WILLIAM LYDFORD.

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Assizes, on the 9th February, 1914, and was sentenced to two months' detention and twelve strokes with a birch rod.

Sherwood for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. The case stated is as follows:—

1. At the 1914 Winter Assizes for the County of Hereford, held before me, Ernest William Lydford, aged 13, pleaded guilty to the larceny of certain postal orders.

2. He was sentenced to be detained in a place of detention for two months, and to receive twelve strokes with the birch rod, and the operation of the sentence of whipping was stayed pending the decision in this case.

3. The questions for the opinion of the Court are:—

(a) Whether, having regard to the effect of s. 102 (1) of the Children Act, 1908, or s. 4 of the Larceny Act, 1861, I had power to sentence him to whipping under the latter or any other statute?

(b) If so, whose duty it is to administer such whipping, or whether I had power to order anyone to administer such whipping?

T. E. SCRUTTON.

February 10th, 1914.

The appellant was indicted under s. 4 of the Larceny Act, 1861, which enacts that simple larceny may be punished by penal servitude or imprisonment, and "if a male under the age of sixteen years, with or without whipping." Under that section a sentence of whipping could only be imposed as an addition to a sentence of imprisonment, the reason being that there is no machinery for carrying out the sentence unless the prisoner passes into the hands of the prison authorities; such machinery exists, whether there is imprisonment or not, when whipping is ordered by a magistrate under s. 10 of the Summary Jurisdiction Act, 1879. The appellant being under the age of fourteen years was a "child" within the meaning of s. 131 of the Children Act, 1908, and by s. 102 of that Act he cannot be sentenced to imprisonment or penal servitude, but under s. 106 he may be committed to custody in a place of detention for a term not exceeding one month. The sentence of two months' detention clearly cannot stand. The Children Act,

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1908, prevents the Court from passing the sentence of imprisonment provided by s. 4 of the Larceny Act, 1861, and so prevents the Court from passing a sentence of whipping, which can only be imposed as an addition to a sentence of imprisonment. In s. 107 of the Children Act, 1908, the various punishments which may be imposed on children are set out, but the section does not provide any new method of punishment. Whipping is mentioned, but this might only refer to the powers of magistrates under the Summary Jurisdiction Act, 1879. Sect. 108 provides for setting up places of detention, but nothing is said as to any power of carrying out a whipping ordered by the Court, nor is there any such provision in s. 109, which also deals with places of detention. Whipping can now only be imposed under statutory authority, and such statutes must be construed strictly. Doubt is expressed whether a child can be ordered to be whipped when convicted on indictment in Mr. Denman's "Archbold Abridged," p. 108, and, perhaps, in Lord Halsbury's "Laws of England," Vol. 9, p. 423.

H. G. Farrant, for the Crown. I agree that a sentence of more than one month's detention cannot be imposed. But there is power to order whipping under s. 4 of the Larceny Act, 1861, which has not been repealed by the Children Act, 1908; the latter Act merely substitutes detention for imprisonment, *i.e.*, one form of confinement for another. (He was stopped on this point.)

It is the duty of the keeper of the place of detention to administer the whipping. Formerly the order went to the governor of the gaol, but he was never named as the person responsible; under s. 119 of the Larceny Act, 1861, only the number of strokes and the instrument have to be named. The Children Act, 1908, now substitutes the superintendent of the place of detention for the governor of the gaol, and the order goes to him.

As an alternative, the duty might fall on the sheriff. A sentence of whipping without imprisonment can be imposed under s. 4 of the Criminal Law Amendment Act, 1885, and in such a case the duty would fall on the sheriff, and he can delegate his duties to the keeper of the place of detention, or to any other proper person.

Sherwood. The sheriff's duties are now prescribed by statute, but it may be that the provisions of the Act are not exclusive.

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The LORD CHIEF JUSTICE: This appeal arises on a case stated by Scrutton J., before whom a lad, aged thirteen, pleaded guilty to the larceny of postal orders, and was sentenced to two months' detention and twelve strokes with a birch rod. The operation of whipping was stayed pending the decision of this appeal. To clear one point out of the way, the sentence of two months cannot stand, since by s. 106 of the Children Act, the power of ordering detention is limited to a period of one month; so that matter must be corrected.

The first question is, whether this boy can be sentenced to be whipped, which depends on the effect of the Children Act, 1908, upon the Larceny Act, 1861. Under s. 4 of the Larceny Act, 1861, there is power to pass a sentence of imprisonment or penal servitude, and "if a male under the age of sixteen years, with or without whipping." Sect. 102 (1) of the Children Act, 1908, enacts that a child shall not be sentenced to imprisonment for any offence, and then power is given under various sections of the Act to order a child to be committed to custody in a place of detention. It is argued that, as a child cannot now be imprisoned, s. 4 of the Larceny Act, 1861, is to that extent repealed, and it follows that no whipping can be imposed, there being no express power to inflict whipping under the Children Act, 1908. It is said that it follows by implication that the power to inflict whipping is repealed. The first difficulty in Mr. Sherwood's way is that the statute does not say so. The Children Act says nothing about whipping, but substitutes a different form of detention for that known as imprisonment. Imprisonment has a certain definite meaning in penal statutes, and that kind of imprisonment can no longer be imposed on children; but detention is a complete loss of liberty, and remains imprisonment although not of the particular character hitherto imposed. The Children Act substitutes detention for imprisonment, and it follows that a sentence of whipping can still be imposed, and that the matter is not disposed of by that Act. The judge, therefore, had power to order whipping; and the first question must be answered in the affirmative.

Then there is the more difficult question. Under the Larceny Act, 1861, and kindred statutes, where imprisonment and whipping are imposed, the obligation is on the governor of the gaol to see that the whipping is carried out, but this does not apply to places of detention. The Children Act, s. 106, substitutes custody

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in a place of detention for imprisonment, and ss. 108 and 109 provide for the conduct of places of detention; but it does not necessarily follow that the superintendent of a place of detention comes under the same obligations as the governor of a gaol. It is pointed out that the place of detention may be a public institution or a voluntary institution, and persons at the head of such institutions have obligations different from those of the governor of a gaol. Nevertheless, if the Court has power to make the order, it must be the duty of someone to carry it out, and it is the duty of the sheriff, unless the words of a statute prohibit it or so limit his duties as to exclude it. The Sheriffs Act, 1887, was a consolidating statute, and is by no means exhaustive of the powers and duties of a sheriff. The sheriff is the person entrusted to carry out the orders of a Court of justice, and though he may appoint deputies, to whom he may delegate the performance of those duties, he is the person responsible, and as the statute does not designate any person, the responsibility devolves upon the sheriff of carrying out the order of the Court. It is not necessary that the person who is to inflict the punishment should be named in the order; under the Larceny Act, 1861, s. 119, it is only necessary to state the number of strokes and the instrument. It is said that s. 109 (1) of the Children Act confers the power on the person in charge of the place of detention, but we cannot read the sub-section in that way. It is the authority for detaining the child in custody, and we cannot read into it the power of inflicting whipping, if it is ordered by the Court. The duty is upon the sheriff, and he may appoint a substitute, who may be the person at the head of such institution, or may be some other person, such as a police officer; that is how the sentence is carried out under the Summary Jurisdiction Act, 1879, s. 108. The answer to the second question, therefore, is that the duty is on the sheriff, or such person as he may designate.

Sentence reduced.

A. L. B. T.

JAMES DORAN.

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A Court of Assize has power to order, at the request of the prosecution, that in the event of a bill of indictment being found, the trial thereof shall be postponed till the next session.

This was an appeal against conviction on a point of law. Appellant was convicted of uttering a forged request for the payment of money, at the Central Criminal Court, on Jan. 20th, 1914, before the Recorder of London. Sentence was postponed till after the hearing of certain charges against other persons during the next Sessions. These persons were acquitted, and on the prisoner coming up for sentence the Recorder ordered the matter to stand over till prisoner's appeal was heard.

H. W. Wickham for the appellant, who was present. The appellant was committed for trial, on November 12th last, for stealing a banker's cheque for £246 from a postal packet. In fact, he was indicted and tried for forging and uttering the cheque; the charge of stealing was dropped. The Sessions to which the appellant was committed opened on December 9th; application was made on that day, on behalf of the Crown, to postpone the trial until the January Sessions, and the trial was postponed before any true bill was found and before plea pleaded. Nor was the prisoner's counsel or solicitor present when the application was made.

The notice of motion was imperfect; it was dated December 6th, and served on December 8th, at 3.15 in the afternoon, and the prisoner had no adequate opportunity, owing to the prison rules, of seeing his friends or Mr. Mockridge, his solicitor. There was no affidavit in support: *Savage*, 1 C. & K. 75 (1843).

Under the Criminal Procedure Act of 1851 (14 & 15 Vict. c. 100), s. 27, the prosecution has no power to make the application to postpone the trial. The trial was postponed in this case simply for the convenience of counsel, and also in order that the prisoners should be tried in one indictment with other people only

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just arrested, and not even committed for trial. Mr. Muir made his application before a true bill was found. Such an application should only have been made after a true bill had been found. The prisoner refused to plead. There might not have been a trial at all.

Each Sessions, under s. 13 (3) of the Interpretation Act, 1889 (52 & 53 Vict. c. 63), at the Central Criminal Court is a separate Assize, and Doran should have been tried on December 9th. The Central Criminal Courts (Prisons) Act, 1881 (44 & 45 Vict. c. 64) s. 2 (4), provides that every person is to be brought up for trial at the next sittings of the Central Criminal Court, and s. 2 of 4 & 5 Will. 4, c. 36 (Central Criminal Court Act, 1834), requires the justices of the Central Criminal Court to deliver the gaol at such times as the Sessions shall be held under s. 15 thereof.

[DARLING J.: Do you mean that the prosecution has no right to apply to postpone a trial ?]

Yes, except upon such grounds as the prevalence of infectious disease or something of that kind. It is noticeable that although the words " or the Prosecutor "—allowing him to postpone—are in the repealed Act, 7 & 8 Vict. c. 71, s. 6, they are expressly left out in the Act of 1851. In both Acts application must be after plea pleaded.

[DARLING J.: This involves that you cannot put off a case from one Assize to another. We have all done it.]

Wickham. A case can only be put off after a True Bill is found. There may never be a case to try. There was nothing before the Court on which it could make any order. There was no person indicted: s. 27 of Act of 1851. See the cases of *Bolam*, 2 M. & Rob. 192 (1839), and *Heesom*, 14 Cox C. C. 40 (1878). The Recorder made an illegal order of postponement, and if the Sessions of the Central Criminal Court are continuing Courts, with power to adjourn cases or respite judgments, this can only be done subject to law, and where the power of postponement

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is not exercised or is wrongly and illegally exercised, which is the same as not being exercised at all, then and in such a case a subsequent sessions of the Central Criminal Court cannot deal with such nugatory orders of a previous Court. For the principle see *Grince*, 19 Viner's Abridgment, 358 (1718), and *Midland Railway Company* v. *Edmonton Union*, (1895) A. C. 485 at 492 and 493.

[The LORD CHIEF JUSTICE: The point you are arguing is that everyone who is not tried at the next Sessions of the Court is entitled to be acquitted.]

I submit that the Court when the man was tried had no jurisdiction. The Recorder made an illegal order before the plea was taken, and therefore the prisoner was right in refusing to plead. The prisoner could not find the bail required—himself, and two sureties in £100 each. Had no bail ultimately been found, he would have been in prison an extra month.

R. D. Muir, for the Crown, was not called upon to argue. A notice in proper form was drawn up, and we did not know who was the prisoner's solicitor. Notice was therefore served upon the prisoner personally. No harm, at any rate, was done. Counsel on the other side did appear after the order had been made, and it might have been rescinded. The Recorder acted strictly in accordance with the Habeas Corpus Act by at once offering bail.

Wickham. I was not informed that the application would be made.

The LORD CHIEF JUSTICE: I must first say that with regard to the statement about the prisoner not being allowed to see his solicitor, that I have here a letter from the governor of the gaol to the effect that permission would have been granted had the request been made.

The appellant was convicted of uttering a forged request for the payment of money. A notice of motion to postpone the trial was made. When the application was heard the Recorder allowed bail.

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It is a confusion of ideas to refuse after this to plead, and to say that the prisoner could not be convicted. The Recorder entered a plea of not guilty, and counsel for the prisoner subsequently took part in the trial, and put forward the defence of the prisoner, who was found guilty by the jury. The Recorder took every precaution to prevent any hardship upon the accused, and in the exercise of his discretion, and having regard to the grounds of the application, was quite justified in postponing the trial. I can see no foundation for this appeal, and the conviction must stand.

Appeal dismissed.

S. W.

Appellant's Solicitors—*Thorne, Mockridge, Owles, Limmer and Wood.*

HENRY HARRY AUSTIN.

Severity of sentence.

This was an appeal against sentence by leave of Rowlatt J. Appellant was convicted of feloniously receiving stolen property, at the Norwich City Sessions, on January 21st, 1914, and was sentenced to four years' penal servitude.

Gerald Dodson for the appellant, who was not present. The appellant was charged with receiving metal to the value of £59, which had been stolen from a brewery, and which three other prisoners also were charged with stealing.

There were two other indictments, and the appellant pleaded guilty. The sentences upon the other prisoners were three months' imprisonment respectively, and in two instances with hard labour. Austin, however, received a sentence of four years' penal servitude.

Counsel for the prosecution invited the Deputy-Recorder to take a distinct line between the thieves and the receiver, and he took the view that when someone is ready to come forward and take stolen

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goods, it does cause additional temptation. The Deputy-Recorder's view was that Austin was at fault.

A large quantity of metal had disappeared from the brewery, but, though Austin had been under observation for some time, it had not gone through his hands. There was evidence to show that £200 worth of metal had been taken in the three months preceding the trial, and Austin was responsible only for the £59 worth of stuff. The inference to be drawn was that the thieves had disposed of the residue of the stuff elsewhere, and that, therefore, Austin was not the instigator of the thefts.

[The LORD CHIEF JUSTICE: There was evidence that Austin fetched the stuff away with a horse and cart.]

Yes. The Deputy-Recorder's reason was that he considered Austin was the real influence; but only £59 worth of stuff was, in fact, traced to Austin, and nearly £150 worth must have gone elsewhere.

I admit that metal has been found on Austin's premises before. Austin, however, has never been in prison before; his age is only twenty-six years; he was made out worse than actually was the case. The mention of the £200 worth of stuff unduly influenced the Deputy-Recorder, and I submit that there is no evidence to support the Deputy-Recorder's statement as to Austin's instigation.

H. Claughton Scott, for the Crown. The fact that Austin was in the background ready to take the metal was largely the cause of the theft. Moreover, with respect to the charge on which Austin was convicted, a piece of copper was found in his possession, which was the property of another firm. It seemed that Austin was dealing with the goods of another firm at least. The nature of the material stolen largely consisted of long pipes.

The LORD CHIEF JUSTICE: The appellant was convicted of receiving metal, and has also pleaded guilty to two other indictments. The sentence passed upon him was four years' penal servitude. Three other prisoners were tried with him, of whom one

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received a sentence of three months' imprisonment, and the other two three months' imprisonment with hard labour in addition. Property of the kind mentioned was found on the appellant's premises to the value of £59. It appears that the pieces of iron were thrown out of the window of the brewery into long grass, and that he removed them. The other prisoners bore a good character.

The Deputy-Recorder imposed a very severe sentence on Austin, thinking him in the main responsible. Austin's assistance was very important, and it was a most serious offence on his part: indeed, the Deputy-Recorder thought that but for Austin these thefts would never have been committed.

But we take into consideration the fact that he has never been in prison before, and reduce his sentence to three years' penal servitude.

Sentence reduced.

S. W.

Appellant's Solicitors—*Joseph, Steward and Pretty*, Norwich.

SIDNEY FRIEDMAN.

Severity of sentence.

In recommending a convict for expulsion, the Court of trial should consider the circumstances of his position, and should not merely make a technical application of the Aliens Act, 1905, 5 *Edw.* 7, *c.* 13.

This was an appeal against sentence by leave of Rowlatt J. Appellant was convicted of feloniously receiving stolen property, at the London County Sessions, at Clerkenwell, on January 21st, 1914, and was sentenced, by the Deputy-Chairman, to twelve months' imprisonment with hard labour, and recommended for expulsion.

G. M. Hilbery for the appellant, who was present. The prisoner was charged with receiving a motor sidecar. The sidecar was

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stolen on December 6th last, and brought to the appellant's premises; it was brought by two prisoners, who asked to leave it with the appellant. It was stored in his backyard, and he was paid 2*s.* for storage.

The most serious part of the case is that the prisoner at first said that he knew nothing about it.

The prisoner should have been dealt with as a first offender. With regard to the question of deportation, it is an extremely serious matter for the prisoner; he has been in England for twenty years, his age being only twenty-five, and he cannot speak a word of Russian if he were to be deported.

H. D. Roome, for the Crown.

DARLING J.: The prisoner was convicted of receiving a motor sidecar, knowing that it had been stolen.

We do not propose to reduce the sentence. The question of expulsion is a different matter. The age of the appellant is twenty-five; he was only five years old when he came to England. If the sentence were to be carried out the prisoner would have to be deported to Russia, which is his native country, and moreover, he would have to serve in the Russian army. He does not know a word of Russian, and has married an English woman, and has also a family in this country, where he lived since childhood.

The view of the Court is that, in these circumstances, to make use of the power of expulsion would be merely making a technical use of the Aliens Act, in order further to punish him and others, and that part of the sentence will accordingly be quashed. The remainder of the sentence, namely, twelve months' hard labour, of course, remains.

Recommendation of expulsion quashed.

S. W.

Applicant's Solicitor—*Henry Hilberry & Son.*

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DAVID BARTRAM.

Severity of sentence, in the case of a charge which was pending when other charges against the same defendant were tried.

This was an appeal against sentence by leave of Rowlatt J. The appellant was convicted of larceny, at the West Kent Sessions, held at Maidstone, on February 16th, 1914, and was sentenced to eighteen months' imprisonment with hard labour. The theft took place on December 24th, 1912: appellant absconded, and was not arrested until November 25th, 1913.

The Appellant appeared in person.

R. F. Gibson, for the Crown.

CHANNELL J.: This is an appeal against a sentence of eighteen months' imprisonment with hard labour. The appellant was convicted for stealing a perambulator. There were six previous convictions against him, but the longest sentence imposed upon Bartram, previous to this offence, was six weeks' imprisonment.

The appellant has complained that when he was sentenced by the Chairman, and his previous convictions were considered, three other convictions were taken notice of, which were for offences committed after that with which he was then charged, of which he had been convicted, and for which he had served his sentences between the time of his committing the offence which was the subject of the present charge and his being apprehended for it. The pending charge as to the perambulator was apparently not known to any of the Courts in the *interim* period; and he says that the Chairman was influenced in passing the sentence which he did by an erroneous impression that there were nine convictions against him previous to the commission of the offence under consideration.

If the prisoner had been brought up for all the four offences at the same time, he would no doubt have had a shorter sentence than he has had on them separately. By mere inadvertence the dates of the previous convictions were overlooked.

The Court therefore reduces the sentence to twelve months' imprisonment with hard labour.

Sentence reduced.

S. W.

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An indictment for larceny at common law is not sustained by proof of larceny under s. 31 *of* 24 *&* 25 *Vict. c.* 96, *the Larceny Act,* 1861.

This was an appeal against conviction by leave of Channell J. The appellant was convicted of larceny, at the Stoke-on-Trent Sessions, on February 10th, 1914, and was sentenced to three years' penal servitude.

Montague Shearman, jun., for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. The appellant was convicted of stealing lead piping from a dwelling-house in Ricardo Street, Longton. The piping had certainly been cut from the premises, and stolen by someone, but I contend that the witnesses for the prosecution were not able to prove that the piping which the prisoner sold was the piping thus stolen.

There were two other indictments against the prisoner, and also a count for receiving.

The Recorder pointed out evidence of theft, but said nothing about receiving; the prisoner was found guilty and convicted of stealing

On an indictment for simple larceny at common law there can be no conviction if the facts shew that an offence under s. 31 of the Larceny Act, 1861, has in fact been committed. See as to this, *Cooper,* 1 Cr. App. R. 88; 24 T. L. R. 867 (1908): C. C. A. But in *Cooper* there was evidence that the women, Cooper and Shea, acted as accessories or receivers. Here the only evidence was that the prisoner was in fact the thief. In *Cooper* the verdict was varied, and there is power to alter the verdict, but not unless the facts warrant it. The jury would not in this case have convicted of receiving, and this case can therefore be distinguished from *Cooper*. See Archbold's Criminal Practice, p. 633.

I submit, in my case, that the jury have convicted specifically of stealing. The prisoner was undefended.

K. E. Poyser, for the Crown. See *Garland,* (1910) 1 K. B. 154; 79 L. J. K. B. 239; 102 L. T. 254; 74 J. P. 135; 26 T. L. R. 130: C. C. A. In this case the word "feloniously"

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JOHN MOLLOY.

Reading L.C.J.
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was omitted; it was held that the prisoner could have been convicted of receiving as a misdemeanour at common law.

He also referred to the Criminal Law Procedure Act, 1851, 14 & 15 Vict. c. 100, s. 24, where reference is made to the omission of the words "against the form of the statute."

The LORD CHIEF JUSTICE: The appellant was convicted of the theft of some lead piping, and received a sentence of three years' penal servitude; he appeals against his conviction. The ground of appeal is that the prisoner was indicted for simple larceny, but the facts did not prove that offence, although under the Larceny Act, 1861 they may have proved another.

There is no means at common law of getting over the difficulty, and it is not one of the cases where the statute law says that though a man is indicted for one offence he may be convicted of another.

With regard to the other point raised, the lead piping sold by the appellant exactly fitted the space where piping had been removed. If the piping was affixed to the building it would not formerly have been the subject of simple larceny, but it is now a statutory offence under s. 31 of the Larceny Act, 1861.

This conviction must be quashed. Two indictments, however, still remain, both of which hold good; but whether or not the facts will support them we cannot of course say—we are not prepared to say that either of the other two indictments is bad on the face of it. This conviction is quashed, but the prisoner must remain in custody, as we do not give any decision with reference to the two remaining indictments.

Conviction quashed.

S. W.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE A. T. LAWRENCE AND MR. JUSTICE LUSH.

ARTHUR PALMER.

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Identification of a suspected person by photograph should be cautiously made. As far as possible, the fact that the photograph of a person on his trial was in the hands of the police should be kept from the jury.

This was an application for leave to appeal against convictions. Appellant was convicted of larceny and of being a habitual criminal, at the Central Criminal Court, on the 18th February, 1914, before Mr. Commissioner Atherley Jones, and was sentenced to five years' penal servitude.

Appellant was not present, and was not represented by counsel.

The LORD CHIEF JUSTICE: The appellant was convicted of stealing a barrow, and also of being a habitual criminal, but as his age is sixty-four, the Commissioner did not pass any sentence of preventive detention. The case has had our careful attention because the Commissioner thought the identification of the appellant by means of a photograph unsatisfactory. The porter whose barrow was stolen was asked by a man in the street to go an errand for him, and was promised threepence. On returning, he found that both the man and the barrow had disappeared. He went to the police-station and gave a description of the man, and on returning there in the evening was shewn fourteen or fifteen photographs, one of which he identified as being, in his view, clearly the portrait of the thief. The police, with the help of that photograph, found the man, who was put in a room with several other men, to two or three of whom he objected, and the police substituted others. The porter then came in and picked him out without any hesitation as being the man. He also identified him at the trial. It appears

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that the appellant is of a distinctive personality. The evidence of identification here is certainly more complete than such evidence often is, and we can see no reason for the view that it was not right to use the photograph in this way, nor do we think that any complaint can be made against the City police. The fact was elicited at the trial that the photograph was one of a number in the hands of the police, and no doubt there was a danger of that fact prejudicing the minds of the jury; but the Commissioner warned the jury most carefully not to be so prejudiced, and it is to be observed that the greater part of the evidence as to the photograph being in the hands of the police was brought out on behalf of the prisoner. We cannot say that the appellant was prejudiced, and have come to the conclusion that there is no ground for giving leave to appeal.

Application dismissed.

A. L. B. T.

JOHN SAMUEL TOTTY.

On an issue as to handwriting, the Court may inform itself by examining the notice of appeal which is in appellant's handwriting.

Proviso to s. 4 (1) *of the Criminal Appeal Act applied in the case of a summing up which was inadequate because it did not put the whole of the defence to the jury.*

This was an appeal against conviction and sentence by leave of Lord Coleridge J. Appellant was convicted of larceny, at the Walsall Borough Sessions, on the 13th February, 1914, and was sentenced to eight months' imprisonment with hard labour.

Lort-Williams for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant was convicted of stealing a postal order for two shillings which had been sent through the post, and in the ordinary course should have arrived on the 25th January at the house where the appellant was lodging. The Recorder misdirected the jury by telling them that the appellant was the first person to come down on that morning, when there was no evidence of that and some evidence to the

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JOHN SAMUEL TOTTY.

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Lush J.

contrary; by telling them that he was the only person who had an opportunity of taking the postal order, when there was no evidence that it ever arrived; and by saying that when the police spoke to him he dodged behind a van and tried to get away, without adding that he had gone to the police-station on the previous day and made enquiries as to the charge against him. The writing of the signature on the postal order is similar to the appellant's handwriting, but no expert was called, and there are many differences, especially in the capital letters.

John Wylie, for the Crown, was not called on.

The LORD CHIEF JUSTICE: In this case the summing up was inadequate and unsatisfactory, since the Recorder treated the case as being so clear as not to be worthy of discussion. A judge should take care to point out all that there is to be said for the defence, especially when the prisoner is undefended by counsel. This case, however, resolves itself into a question of handwriting. A document written by the appellant in the presence of the police was produced at the trial, and we have the advantage also of seeing a longer document written and signed by him, namely his notice of appeal. If there was any doubt before, it completely disappears on a comparison of the writing on the postal order with that in the notice of appeal. The conviction must be affirmed under the proviso to s. 4 of the Criminal Appeal Act, 1907, on the ground that the jury would have come to the same conclusion even if there had been a long and careful summing up.

Appeal dismissed.

A. L. B. T.

JOSEPH CARNEY.

The Court will correct a sentence unwarranted by law.

This was an appeal against sentence, by leave of Lord Coleridge J. Appellant was convicted of attempting to obtain money by false pretences, at the Oldham Borough Sessions, on

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JOSEPH CARNEY.

Reading L.C.J.
Lawrence J.
Lush J.

the 13th February, 1914, and was sentenced to six months' imprisonment with hard labour.

Appellant in person.

Comyns Carr, for the Crown. I cannot support the sentence of hard labour.

The LORD CHIEF JUSTICE: In this case there has been a slip, and hard labour has been inflicted in respect of a common law offence for which it cannot be imposed. The Court reduces the sentence to one of six months' imprisonment without hard labour.

Sentence reduced.

A. L. B. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE A. T. LAWRENCE AND MR. JUSTICE LUSH.

WILLIAM BARRON.

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The quashing of a conviction by this Court is tantamount to an acquittal for the purposes of the plea of autrefois acquit.

The true test of the validity of that plea is whether acquittal on the former indictment necessarily involves acquittal on the latter.

The acquittal of the whole offence is not an acquittal of every part of it: De Salvi, 10 *Cox C. C.* 481, *n.* (1857), *approved.*

An acquittal of sodomy does not imply an acquittal of gross indecency.

This was an appeal against conviction on a point of law. Appellant was convicted of gross indecency with a male person, at the Winchester Assizes, on the 14th February, 1914, before Ridley J., and was sentenced to eighteen months' imprisonment with hard labour.

W. Blake Odgers for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. The appellant was committed for trial at the Winchester Assizes on two indictments charging him with sodomy, and with gross indecency with a male person; he was tried and convicted on the first indictment on the 10th November, 1913, but that conviction was quashed by this Court on the 8th December, 1913, on the ground that evidence had been wrongly admitted. (See 9 Cr. App. R. 236; 30 T. L. R. 187.) The Court then ordered that the appellant should remain in custody to be tried on the second indictment. In February I obtained leave to withdraw the plea of "not guilty" which had been entered at the previous Assize, and to substitute one of *autrefois acquit*. When that issue came up for trial, the learned judge suggested that the order of this Court bound him to try the case.

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WILLIAM BARRON.

[The LORD CHIEF JUSTICE: The Court did not then consider whether such a plea could be raised; as another indictment was on the file we could not order the appellant to be released, but we certainly never meant to decide that *autrefois acquit* would be a bad plea.]

The judge laid down that the mere fact that the appellant had never been in jeopardy on this indictment at the first trial was a complete bar to the plea being successful. There are authorities to the contrary, and my submission is that where the facts are the same the plea can succeed, even though the prisoner could not have been convicted on the second indictment at the first trial. In *Ollis*, (1900) 2 Q. B. 758; 69 L. J. Q. B. 918; 83 L. T. 251; 49 W. R. 76; 64 J. P. 518; 19 Cox C. C. 554; C. C. R., Darling J. said: "This is, in effect, to state that this case comes within the rule 'Nemo debet bis puniri pro uno delicto,' a rule which applies equally in civil actions, under the form 'Nemo bis vexari debet pro eadem causa.' This rule is the foundation of the pleas in bar known as *autrefois acquit* and *autrefois convict*." "Pro uno delicto" must mean "for one wrongful act." Archbold's Criminal Pleading, 24th ed., p. 176, says: "The principle on which the right to plead *autrefois acquit* or *autrefois convict* depends, is that a man should not be put twice in jeopardy for the same matter, and it does not rest on any doctrine of estoppel. But it seems always to have been held that a previous acquittal can only be pleaded in bar to a subsequent indictment—(1) Where the acquittal is for the exact offence charged in the subsequent indictment; or (2) where the subsequent indictment is based on the same acts and omissions in respect whereof the previous acquittal was made, and some statute directs that the defendant shall not be tried or punished twice in respect of the same acts or omissions. . . . By s. 33 of the Interpretation Act, 1889 (52 & 53 Vict. c. 63), it is provided that 'where an act or omission constitutes an offence under two or more Acts, or under an Act and at common law (whether such Act was passed before or after the commencement of this Act), the offender shall, unless the contrary intention appears, be liable to be prosecuted under either or any of those Acts or at common law, but shall not be liable to be punished twice for the same offence.' Perhaps this enactment would have been clearer if for the word 'offence' at the end had been substituted the words 'acts or omissions,'"

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In *Clark*, 1 B. & B. 473 (1820), eleven judges unanimously overruled a demurrer and allowed the plea. They held that the true test is whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first. In the present case the prosecution had to rely on exactly the same evidence of indecency at the second trial as at the first: there was only one set of depositions to support the two charges. Where two charges are based on the same facts framed differently, an acquittal on the first is a bar to the second. Regard should be had to the facts, and not merely to the form of the charge. The judgment of Hawkins J., in *Miles*, 24 Q. B. D. 423; 69 L. J. M. C. 56; 62 L. T. 572; 38 W. R. 334; 17 Cox C. C. 9; 54 J. P. 549; C. C. R.; (1890), is in my favour; there it was held that the assault of which the defendant had been convicted before the magistrates was the sole foundation upon which the subsequent conviction on indictment rested, although aggravations were added to it which, at first sight, made the offences appear different, more particularly a count for wounding; the conviction on indictment was therefore quashed, although the prisoner could not have been convicted on the first trial of the offence charged on the second. Hawkins J., quoting from the judgment of Blackburn J., in *Wemyss* v. *Hopkins*, L. R. 10 Q. B. 378; 44 L. J. M. C. 101; 33 L. T. 9; 23 W. R. 691 (1875), said it was a defence grounded "on the well-established rule at common law that whenever a person has been convicted and punished for an offence by a Court of competent jurisdiction, *transit in rem judicatam*—that is, the conviction shall be a bar to all further proceedings for the same offence, and he shall not be punished again for the said matter; otherwise there might be two different punishments for the same offence." He also cited *John Walker*, 2 M. & R. 446 (1843); *Stanton*, 5 Cox C. C. 324 (1851); and *Elrington*, 1 B. & S. 688; 31 L. J. M. C. 14; 8 Jur. (N. S.) 97; 5 L. T. 284; 10 W. R. 13; 9 Cox C. C. 86; Q.B. (1861).

[LUSH J.: For the plea to succeed must not the acquittal have been on the merits, *i.e.*, by verdict of the jury? See Russell on Crimes, 7th ed., pp. 1982—3; and *Drury*, 3 C. & K. 193; 18 L. J. M. C. 189; 3 Cox C. C. 546 (1849).

The LORD CHIEF JUSTICE: Under s. 4 (2) of the Criminal

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WILLIAM BARRON.

Appeal Act if the Court allows an appeal against conviction it is to quash the conviction and direct a judgment and verdict of acquittal to be entered. We must, therefore, treat this case as if there had been an acquittal by the jury.]

In *King*, (1897) 1 Q. B. 214; 66 L. J. Q. B. 87; 75 L. T. 392; 18 Cox C. C. 447; 61 J. P. 329; C. C. R., where a defendant was convicted first of obtaining credit by false pretences, and then for larceny, the latter conviction was quashed on the ground that the first conviction was in respect of the same goods as the conviction for larceny, and Hawkins J. said: "It is against the very first principles of the criminal law that a man should be placed twice in jeopardy upon the same facts: the offences are practically the same, though not their legal operation." There the prisoner could not have been convicted of larceny at the first trial, and much of the evidence on the charge of obtaining credit by false pretences would have been irrelevant on the charge of larceny. *Norton*, 5 Cr. App. R. 197 (1910), is distinguishable, as the facts in the two offences of which the prisoner was convicted were quite different, and that was the ground of the decision. It is not sufficient to look only at the indictments to see if the charges are the same; the evidence also should be looked at. If the same facts must be proved in both cases, the plea should succeed. If the evidence is identical, the previous acquittal must cover any form in which the offence can be stated.

Du Parcq, for the Crown. The appeal fails because the appellant was never before in jeopardy as regards this offence. He could not have been convicted of this offence on the former indictment, and the evidence necessary to support the second indictment would not have been sufficient to procure a conviction upon the first. The Court should not look at the facts to see whether the two charges relate to the same circumstances or not; such a course would have been impossible before the days of police court proceedings. In *Serné*, 107 Cent. Crim. Ct. Sess. Pap. 418 (1888), a man was accused of setting fire to a house in which there were children, who were killed. He was tried and acquitted on a charge of murder, but Charles J. held that this was no bar to his trial for arson. In *Gilmore*, 15 Cox C. C. 85 (1882), the prisoner was acquitted on a charge of doing certain acts with intent to endanger the safety of

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passengers on a railway, which was a felony, and he was then indicted for doing the same acts without the intent, which was a misdemeanour. Although the same evidence would be given on each charge, Huddleston B. held that a plea of *autrefois acquit* was not a good one; he said, "The authorities clearly shew that an accused person who relies upon a previous acquittal must make out satisfactorily that he has been acquitted of the identical charge before, or that he could upon the trial of the first indictment have been lawfully convicted of the offence which was charged in the second indictment."

Russell on Crimes, p. 1985, states: "At common law an acquittal of misdemeanour was not a bar to an indictment for felony, nor an acquittal of felony a bar to an indictment for misdemeanour; but this is expressly altered by 14 & 15 Vict. c. 100, s. 12, as to acquittals on indictments for misdemeanour. Under the present practice the substance rather than the form of the charges in the two indictments is considered." The last sentence means cases where two Acts give different names to what is in every respect the same offence. In *Frederick Miles*, 3 Cr. App. R. 13 (1909), a prisoner who had been acquitted of larceny was convicted on an indictment supported by exactly the same evidence of fact, under s. 7 of the Prevention of Crimes Act, 1871 (35 & 36 Vict. c. 112), and this Court upheld the conviction. Lord Alverstone C. J. said: "The judge has a discretion in such a matter, and if, when a man has been acquitted, he considers the acquittal should make an end of the whole case, he can express his opinion." There have been cases where a prisoner, after being acquitted on a charge of stealing a horse, has been tried for stealing the saddle on the horse's back. (See Russell on Crimes, p. 1992, citing 2 Hale, 246.) This shews how strictly the rule is applied. In *Tancock*, 13 Cox C. C. 217; 34 L. T. 455 (1876), a prisoner was convicted of manslaughter. Afterwards a coroner's jury returned an inquisition for murder upon the same facts. At the trial he pleaded *autrefois convict*, and Denman J. ruled to the jury that he thought the plea proved, at the same time stating that, if he thought the case would have ultimately resolved itself into one of murder, he should have tried the prisoner, and, if necessary, reserved the point for the consideration of the Court for Crown Cases Reserved. *Holcroft*, 2 Coke's Rep. Part IV. 46b; 2 Hale, 246 (1578), was cited in argument, in which case a conviction for

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manslaughter was held to be a bar to a charge of murder on the same facts, but in that case the conviction for manslaughter may have been on an indictment for murder. In *De Salvi*, 46 Sess. Pap.; 10 Cox C. C. 481, n. (1857), a prisoner was acquitted on a charge of wounding with intent to kill, and was then indicted for murder, when a plea of *autrefois acquit* was held by three judges to be bad, on the ground that, although the jury in the first trial had found that there was no intent to kill, on a charge of murder such an intent would be presumed in certain cases. It was held there that the omission to aver the identity of the crime charged with that of which the prisoner had been acquitted, was fatal to the plea.

Blake Odgers. The cases seem to be conflicting, but I rely on *Elrington, Wemyss* v. *Hopkins, Miles* and *King*—particularly on *King*, which is subsequent in date to *Serné, Gilmore,* and *De Salvi*, cited against me. In none of the cases which I have cited could the prisoner have been convicted on the second charge at the first trial. In *Frederick Miles*, the evidence could not have been the same at the two trials, as evidence of previous convictions would have been admissible on the charge under the Prevention of Crimes Act, 1871, which could not have been given on the charge for larceny. *Elrington* was followed in *Grimwood*, 60 J. P. 809 (1896). *Sheen*, 2 Car. & P. 634 (1827), is also in my favour. If a prisoner stole a purse from the same man twice on the same day, the two charges would appear on the face of the indictments to relate to one and the same offence, and the evidence would have to be looked at to see whether it was one offence or two. The matter turns on the meaning of the expression "in peril," which must mean, I submit, in peril for the same wrongful act.

C. a. v.

23 *March.*

The following judgment was read on the 23rd March by

The LORD CHIEF JUSTICE: The appellant was indicted before Ridley J. on a charge of gross indecency with a boy. He pleaded *autrefois acquit*, but his plea was overruled. He then pleaded guilty, and was sentenced to eighteen months' hard labour. He has appealed to this Court, and his counsel contended that the learned judge was wrong in rejecting the plea.

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Reading L.C.J.

The facts are as follows:—

The appellant had been previously indicted on the same facts on a charge of sodomy with the same boy. He was convicted and sentenced. He appealed to this Court, and the Court quashed the conviction on the ground that evidence had been wrongly admitted. Following the provisions of s. 4 (2) of the Criminal Appeal Act, a judgment and verdict of acquittal were entered. The indictment on which he was subsequently tried was still on the file, and the Court ordered that the appellant be remanded in custody to take his trial at the next Assizes upon a certain other indictment found against him.

Mr. Blake Odgers, on his behalf, contended that the learned judge had wrongly refused to entertain the plea of *autrefois acquit* on the ground that he was precluded by the order of the Court from doing so. The learned judge does appear to have taken this view. It is a view with which we do not agree. The order of the Court of Criminal Appeal did not deprive him of any defences that were available, and the plea of *autrefois acquit* was as open to the appellant as if no order had been made by this Court. The learned judge, however, while declining to hear Mr. Blake Odgers's argument, held that the plea was bad in law, and we have to say whether we agree or not with that ruling.

We have carefully considered the able arguments that were presented to us by the learned counsel, and the cases that were cited to us, and we are of opinion that the plea of *autrefois acquit* was rightly rejected.

The principle on which this plea depends has often been stated. It is this, that the law does not permit a man to be twice in peril of being convicted of the same offence (4 Hawkins P. C. 311; B. II. c. 35). If, therefore, he has been acquitted, *i.e.*, found to be not guilty of the offence, by a Court competent to try him, such acquittal is a bar to a second indictment for the same offence. This rule applies not only to the offence actually charged in the first indictment, but to any offence of which he could have been properly convicted on the trial of the first indictment. Thus, an acquittal on a charge of murder is a bar to a subsequent indictment for manslaughter, as the jury could have convicted of manslaughter (2 Hale P. C. p. 246). Now, the appellant, having by order of this Court, on his appeal from his first

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conviction, had a judgment and verdict of acquittal entered, is in the same position for all purposes as if he had actually been acquitted. The question, therefore, that we have to consider is whether the acquittal on the charge of sodomy involves, according to the principles that we have stated, an acquittal on the charge of gross indecency.

Mr. Blake Odgers contended that the true test by which this question has to be decided is this: Were the facts which were in evidence at the first trial the same facts as those on which the prosecution relied in support of the second indictment. If they were, he says that the appellant was "in peril" on the former trial, notwithstanding that the appellant could not at the trial on the first indictment for the more serious offence have been convicted of the minor offence. He cited in support of this contention mainly the case of *R.* v. *King*, (1897) 1 Q. B., p. 214. The headnote to the report of this case states that a defendant who has been convicted upon an indictment charging him with obtaining credit for goods by false pretences cannot be afterwards convicted upon a further indictment charging him with larceny of the same goods, and Hawkins J. is reported (p. 218) as having said, "It is against the very first principles of the criminal law that a man should be placed twice in jeopardy upon the same facts: the offences are practically the same, though not their legal operation." It is quite plain that the learned judge did not intend to lay down, and did not lay down, as a general principle of law that a man cannot be placed twice in jeopardy upon the same facts if the offences are different. The statement obviously refers to a case where the offences are the same, "practically the same," the words are, and as the two offences in the present case are not either exactly or practically the same it does not help the appellant. But the words are omitted in the report of the same judgment in 66 L. J. Q. B. at page 90, and it seems reasonably clear from that report that the learned judge was really expressing the view that, having regard to the conviction of the defendant on the first indictment of obtaining credit for the *same* goods by false pretences, and also by fraud, the judge should not as a matter of fairness, and in the exercise of a proper judicial discretion, have allowed the second trial to take place, which is, of course, a very different proposition. Mr. Justice Cave, in the same case, said that the question was "whether a person who has been convicted

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Reading L.C.J.

of obtaining goods by false pretences can be tried upon an indictment for stealing the *same* goods? I think he cannot." (See 66 L. J. Q. B., p. 80.)

It would appear that the decision of the Court was given either because in the exercise of his discretion the judge should not have permitted the trial for larceny, or because the verdict in the first trial was based upon a view of the facts which was inconsistent with that necessary to support the further indictment. At the first trial the conviction implied that the property in the goods passed to the defendant with the consent of the owner, who was induced thereto by false pretences, whereas conviction at the trial for larceny implied that the defendant feloniously took the goods without the consent of the owner.

The substantial identity of the offence was recognised in *R.* v. *King* as an essential condition to the validity of the plea of *autrefois convict* or *autrefois acquit*, and that case made no change in the general and well settled principle of law applicable to these pleas.

The test is not, in our opinion, whether the facts relied upon are the same in the two trials. The question is whether the appellant has been acquitted of an offence which is the same offence as "gross indecency," *i.e.*, whether the acquittal in the charge of sodomy necessarily involves an acquittal on the charge of gross indecency. It is quite clear that the jury could not have convicted the appellant of gross indecency at the first trial. And it is equally clear that the acquittal on the graver charge did not necessarily involve an acquittal of the minor offence. The graver charge of sodomy involves gross indecency and something else, and as was decided in *R.* v. *De Salvi*, 10 Cox C. C. p. 481, note, and 46 Cent. Crim. Ct. Sess. Paper, p. 884, an acquittal of the whole of an offence does not involve an acquittal of every part of it. There has therefore been no verdict that the appellant was not guilty of gross indecency, and the appellant has never been in peril before of being convicted of gross indecency.

The rule of law now affirmed by this Court has never been doubted or qualified, though it has not always been found easy to apply the rule to the facts of particular cases under discussion. In this case penetration was an essential element of the charge of sodomy, and intention to penetrate of an attempt to commit that offence. Neither the act of penetration nor the intention to pene-

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trate is an essential element of the offence of gross indecency, so that the offence to which the appellant eventually pleaded guilty at the second trial is not the same or substantially the same as that charged against him at the first trial.

For these reasons the appeal must be dismissed.

Appeal dismissed.

A. L. B. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING, AND MR. JUSTICE ATKIN.

LOUIS COHEN.

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23 & 24 *March.*

It is an "imputation" within s. 1 (*f*) (*ii*) *of* 61 & 62 *Vict. c.* 36, *the Criminal Evidence Act*, 1898, *to suggest that a witness for the prosecution, tendered as an accomplice, and a person of bad character, has committed a crime other than that he has admitted.*

A judge may use his discretion whether it would not be against the defendant's interest to warn the jury against the effect of an inadmissible question (under the said sub-s.) improperly put and disallowed by the Court.

The practice of this Court is to require corroboration of an accomplice's evidence even though it be not required by statute: Everest, 2 *Cr. App. R.* 130 (1909); *and* Wilson, 6 *Cr. App. R.* 125 (1911), *affirmed.*

This was an appeal against conviction and sentence by leave of Lord Coleridge J. Appellant was convicted of subornation of perjury, at the Central Criminal Court, on the 20th February, 1914, before Horridge J., and was sentenced, on the 25th February, to three years' penal servitude.

E. E. Wild, K.C. (with him *W. Frampton*) for the appellant, who was present. The appellant had written a series of articles in the *Winning Post*, and in 1911 these articles were re-published in book form as "Reminiscences of Kimberley." This book contained attacks on Sir Joseph Robinson, in particular a statement that about 1879 he had sold to a Boer a barrel supposed to contain coffee, but which, on examination, was found to hold coffee on the top and pebbles underneath. Sir Joseph Robinson took proceedings for libel, and the appellant delivered a defence of justification. In compliance with an order for particulars, the appellant alleged that Sir Joseph had in 1879 admitted the accuracy of this story. He was ordered to say to whom the admission was made, and his answer was that it was made to himself and to one Berger.

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At the trial in November, 1911, only Berger gave evidence of the admission, and he stated that in 1879 he had an altercation with Mr. Robinson, as he was then, at the "Blue Posts," an inn at Kimberley, from which the jury were asked to infer an admission by Robinson. The jury returned a verdict for Robinson with £1,000 damages.

In April, 1912, Berger was arrested on a charge of committing frauds by means of cheques, and his birth certificate was found upon him, which shewed that he was born in July, 1869. It appeared that in 1879 he was a boy at school at Glasgow. He was charged with perjury, and pleaded guilty to the charge at the Central Criminal Court, on the 12th July, 1912; he was sentenced to three years' penal servitude by Bankes J. In prison he apparently made a statement, and communicated with Messrs. Lewis & Lewis, Robinson's solicitors, as a result of which an information was laid against the appellant charging him with suborning Berger to commit this perjury, on which charge he has been convicted.

The first ground of appeal is that he was prejudiced by an inadmissible question as to character in cross-examination. He was asked whether he was in custody for illicit diamond dealing; the judge said he did not think it was a proper question, and Mr. Gill argued that it was rendered admissible by a statement made by counsel for the defence in opening that the appellant was respected by all who knew him. The judge, however, disallowed the question. At the end of his cross-examination Mr. Gill asked the witness whether the statement by counsel in opening was made on his instructions, and whether he wished to give any evidence in support of it; the judge disallowed that question also. Cross-examination to character was inadmissible; under the Criminal Evidence Act, 1898, 61 & 62 Vict. c. 36, s. 1 (f), "A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to shew that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless . . ."

"(ii) He has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his own good character, or the nature or conduct of the defence is such as to involve imputa-

tions on the character of the prosecutor or the witnesses for the prosecution." A statement made by counsel does not come within the terms of the statute so as to let in cross-examination as to character: the words of the Act are mandatory, "a person . . . shall not be asked"; the mere asking of a question, therefore, although it was disallowed, is sufficient to invalidate the conviction. Possibly, if the judge had directed the jury to ignore the matter that might have made a difference, but he did not do so. *Ellis*, (1910) 2 K. B. 746; 79 L. J. K. B. 841; 102 L. T. 922; 74 J. P. 388; 26 T. L. R. 535; 5 Cr. App. R. 41; is in support of these propositions; Bray J., in delivering the judgment of the Court, said: "The statute provides that the question shall not be asked. The reason of this is plain, because in most cases the mischief is done by the asking of the question. The jury naturally assume that no such question would be put unless there was foundation for it." If the jury may have been influenced by the questions the conviction cannot stand. *Fisher*, (1910) 1 K. B. 149; 79 L. J. K. B. 187; 102 L. T. 111; 74 J. P. 104; 26 T. L. R. 122; 3 Cr. App. R. 176. In *Warner*, 1 Cr. App. R. 227 (1908), a conviction was quashed because evidence of a previous conviction was accidentally given, and the jury were not warned to disregard it. An attempt by the prosecuting counsel to provoke the prisoner to give an answer which would expose him to cross-examination as to character was held to be improper in *Rouse*, (1904) 1 K. B. 184; 73 L. J. K. B. 60; 89 L. T. 677; 52 W. R. 236; 68 J. P. 14; 20 Cox C. C. 592; 20 T. L. R. 68: C. C. R.

[DARLING J.: In *Lee*, 72 J. P. 253; 24 T. L. R. 627; 1 Cr. App. R. 5 (1908), the conviction was quashed because evidence of a previous conviction came out, but Lord Alverstone C. J. said that it was an exceptional case, and not likely to form a precedent.]

In *Stratton*, 3 Cr. App. R. 255 (1909), this Court did not interfere, because the jury had been cautioned to disregard a question as to the prisoner's previous conviction, which had been improperly asked in cross-examination. That is what the judge should have done here, if he did not stop the case and discharge the jury.

Secondly, the evidence of Berger, who was an accomplice, was

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not corroborated, or not sufficiently corroborated, on the question of subornation. There is no doubt that Berger did commit perjury, but the important issue was whether the appellant knew that his evidence was false. The judge directed the jury that there were two points on which they could find corroboration. The first was the evidence of Powell, who said that he met Berger in Johannesberg in 1895, and introduced him to the appellant as a newcomer; Powell said that Berger looked from twenty-seven to thirty years old then. The appellant admitted the introduction, but denied the conversation; if it ever occurred it was one that was very easily forgotten. There was no evidence that Berger and the appellant met between 1896 and 1909. If this evidence amounted to corroboration at all, it was the merest scintilla. The other matter which the judge suggested amounted to corroboration was that in May, 1912, when Berger was in prison waiting to be brought up at Bow Street, a man named Collings, who was a solicitor who had been struck off the rolls, and who was a friend of Berger's and the appellant's, came to see the former, and got a statement from him which exculpated the appellant; it was suggested that Collings had been sent by the appellant to get the statement. Collings said the statement was procured to be used in mitigation of Berger's sentence. There was no evidence that Collings was the appellant's agent, and in any case it was not an unreasonable statement for the appellant to get from a man whom he had called as a witness, and whom he had just found to have committed perjury. Such an action in 1912 could not be corroboration of the state of his mind in 1911. This incident was no corroboration, but it was dealt with largely in the summing up.

The verdict was against the weight of the evidence. The appellant said that he had been deceived by Berger, and believed his story. Much independent evidence was called on his behalf to shew that Berger, long before Sir Joseph Robinson's action was begun, had frequently boasted that he had been in Kimberley in the early days, and that he looked much older than he really was. There were also two incidents to which the defence attach importance. One was known as the Shepherd's Bush race; Berger was beaten in a hundred yards' race by the appellant, and said it was no disgrace to be beaten by a man younger than himself. The other was known as the Napoleonic book; in July, 1910, on a day which Berger said was his birthday, he gave the appellant a

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book on Napoleon, and put in it the inscription, "To my friend, Louis Cohen, from his friend, Emile Berger, on the occasion of his fifty-sixth anniversary." This evidence should have outweighed that of Berger, as to which there was the smallest corroboration, if any.

The sentence was excessive for a man of sixty who had never been in trouble before.

Gill, K.C. (with him *R. D. Muir* and *R. G. Cruickshank*), for the Crown. The prosecution was entitled to cross-examine the appellant as to character, not only on the ground that his own character had been put in issue, but also on the ground that imputations had been made on the character of Berger, one of the witnesses for the prosecution. I opened that Berger was an accomplice, was undergoing a sentence for perjury, and had also been arrested for cheque frauds, but he was cross-examined as to a suggested contemplated fraud on an insurance company. *Watson*, 109 L. T. 335; 29 T. L. R. 450; 8 Cr. App. R. 249 (1913), is authority that such questions, going beyond what is opened by the prosecution, are imputations within the meaning of the section. (He was stopped on this point.)

The law as to corroboration of an accomplice's evidence is to be found in *Blatherwick*, 6 Cr. App. R. 281 (1911), and *Wilson*, 6 Cr. App. R. 125 (1911). It is not a rule of law that an accomplice must be corroborated, but a rule of practice; if the jury have been duly warned of the danger of convicting without corroboration, a verdict of guilty should not be set aside even if in fact there was no corroboration. They have a legal right to convict upon the evidence of the accomplice (see Stephen's "Digest of the Law of Evidence," 6th ed., pp. 135 and 136, and *In re Meunier*, (1894) 2 Q. B. 415; 63 L. J. M. C. 198; 18 Cox C. C. 15; 71 L. T. 403). Here the judge strongly cautioned the jury, and pointed to two pieces of evidence as being possible corroboration; the question of the value of that corroboration was for the jury.

[DARLING J.: In *Everest*, 73 J. P. 269; 2 Cr. App. R. 130 (1909), it was laid down that, "The rule has long been established that the judge should tell the jury to acquit the prisoner if the only evidence against him is that of an accomplice, unless that evidence is corroborated in some particular which goes to implicate the

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accused. It is not sufficient that there should be corroboration in some particular which does not touch the prisoner." Juries may miss that distinction.]

The cases on the subject of corroboration are collected in Russell on Crimes, 7th ed., pp. 2282—2293, and it would appear that the law is properly laid down in *Wilson*. In *Crane*, 7 Cr. App. R. 113 (1912), Hamilton J., quoting Lord Alverstone C.J. in *Blatherwick*, said: "*Everest* goes too far; *Wilson* is the correct statement of the law." See also *Boyes*, 1 B. & S. 311; 30 L. J. Q. B. 301; 9 Cox C. C. 32 (1861); and *Stubbs*, Dears. C. C. 555; 25 L. J. M. C. 16; 1 Jur. (N. S.) 1115; 4 W. R. 85; 7 Cox C. C. 48 (1855).

[The LORD CHIEF JUSTICE: I think it is established that up to the passing of the Criminal Appeal Act corroboration of an accomplice was not a rule of law, but a rule of prudence and discretion. The practice was to caution a jury strongly against acting on the evidence of an accomplice only. But the powers given to this Court are far more elastic, and we can set aside the conviction if we thought it unsatisfactory, although in strict law the evidence was sufficient.]

Corroboration means anything which has a tendency to make you believe that a fact asserted was true, which was relevant to the charge, and which implicated the accused. If there is such corroboration the Court would have regard to the whole facts of the case, and would consider Berger's story in order to see whether the conviction was satisfactory or not. It must be remembered that Berger gave evidence which was all untrue in an action in which he had no interest, and against a man against whom he had no grudge. Robinson threatened to apply for an injunction to restrain the appellant from publishing his book, and in order to resist this Cohen said he proposed to justify. Berger says that Cohen told him he was in a difficulty about getting witnesses, and asked him to help him, that he said that the action would never be tried as he would make such charges against Robinson that he would not dare go into Court. This is borne out by the fact that many irrelevant and scandalous charges were put on the record, and the matter carried to the Court of Appeal, where there is

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publicity of interlocutory proceedings, and where they were struck out. It was only eight days before the trial that Cohen under pressure gave the names of Berger and himself as persons who could speak as to Robinson's alleged admission of the coffee story. Berger said that Cohen told him he was only to corroborate him, Cohen, but in the end Cohen was not examined on that story, although questions were put to Robinson in cross-examination which suggested that Cohen would be called on the point. Cohen was pressed at his trial by the judge as to this, and his only explanation was that it was a mistake. Berger said that he was taken by the appellant to his solicitor's office, where a proof was practically dictated to him; Cohen said he did not know what took place when the proof was taken, and a clerk was called to prove Berger's visit to the office, but no record of this visit in any form was forthcoming.

As to the independent evidence called for the defence, this Court has not had the opportunity of seeing the witnesses as the jury did; and the evidence of many of them was vague. According to Cohen there never was any conversation between him and Berger as to the early days at Kimberley, which is incredible if Cohen really believed that Berger had been there then. Berger's explanation of the Napoleonic book episode was that he gave the book to Cohen not on his own birthday, but to celebrate Cohen's birthday, which was in fact in the previous February, as he had had no money then. It is not usual to give presents in celebration of your own birthday. (He was stopped by the Court.)

E. E. Wild, K.C., in reply. The detective who arrested Berger in 1912 said that he looked to be a man of fifty-five. Cohen's version of the race incident was corroborated, and at the time of the race the book was not even written. In 1879 there were 40,000 people in Kimberley, so Cohen may well have not met Berger if he had been there. If Cohen had been lying he would have said that he did discuss Kimberley matters of that time with Berger.

As to corroboration, *Everest* and *Warner* are the cases most favourable to the appellant; so is *Farler*, 8 Car. & P. 106 (1837), and *Tate*, (1908) 2 K. B. 680; 77 L. J. K. B. 1043; 72 J. P. 391; 99 L. T. 620; 1 Cr. App. Rep. 39, where the conviction was quashed because the jury were not warned. The judge misdirected the jury in telling them that there was evidence fit to be

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considered as corroboration, and especially in directing them that the Collings incident was corroboration.

The LORD CHIEF JUSTICE: The appellant was convicted on three counts of an indictment charging him with suborning one Berger to commit perjury, with conspiracy to commit perjury with Berger, and with abetting Berger to commit perjury. In substance, what the jury had to consider was the first count. The case lasted five days, but the material facts can be shortly stated. The appellant wrote some articles on life in Kimberley, which were published first in the *Winning Post*, and subsequently in book form, containing passages reflecting on the character and reputation of Sir Joseph Robinson; in particular, a statement amounting to a charge that he had fraudulently sold to a Boer a barrel of pebbles under the pretence that it contained coffee. On that passage and others Robinson brought an action for libel against the appellant in 1911. The appellant justified, and was ordered to give particulars, and it is sufficient to say that as a result of orders made in the action the appellant was ordered to state the names of the persons to whom Robinson was said to have made an admission; one of the names was that of Berger, which was given undoubtedly under great stress, on the 13th November, 1911. The action was tried before Grantham J., on the 21st and 22nd November, 1911, and the jury returned a verdict for the plaintiff. Berger made statements on oath, the substance of which was that he had met Robinson in 1879 at the "Blue Posts" in Kimberley; that he had had a dispute with Robinson, as a result of which he had made some reference to the incident of the sale of pebbles as coffee to the effect that Robinson could not deal with him as he had dealt with the Boer, and that Robinson had said he would do as he pleased: it was suggested by Berger that by his language or demeanour on that occasion Robinson admitted the truth of the charge.

The jury believed Robinson, and awarded him £1,000 damages. Berger was arrested in April, 1912, on a charge of passing fraudulent cheques, and upon him was found his birth certificate shewing that he was born in 1869; therefore in 1879 he was a boy of ten years old. He was charged with committing perjury at the trial of the libel action, and pleaded guilty, and was sentenced to three years' penal servitude. Some time in the latter part of 1913 the

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appellant was charged with suborning Berger to commit this perjury. The substantial charge against him was that, as he was being sued for libel, and was in great difficulty in finding support for his story against Robinson, he had concocted this incident and had induced Berger to come forward and swear to the truth of it. That was the substantial question which the jury had to try. Berger was called as a witness for the prosecution, and was cross-examined at great length; the appellant was also called, and there was a direct conflict of evidence between the two. Berger on his own shewing was an accomplice, the prosecution opened that he was an accomplice, and the jury were also made aware that he had been arrested on a criminal charge concerning cheques. A body of evidence was called, and as a result the jury found the appellant guilty on the three counts. An appeal from that conviction is now before us, and it is based on three grounds.

The first ground of appeal is that, during the course of the case counsel for the prosecution put a question to the appellant when he was in the witness-box which charged him with an offence other than that for which he was being tried, namely, "Were you in custody on a charge of illicit diamond dealing?" The judge ruled the question inadmissible as soon as it was put, not waiting for an objection to be taken by the defence. It was argued on behalf of the prosecution that it had become admissible, but the judge disallowed it. Subsequently another question was put to the appellant based on the fact that although counsel for the defence had opened that the appellant was a man of good character, no questions in support of that statement had been put to the appellant. He was asked whether the statement by counsel was made on his instructions, and whether he wished to give any evidence in support of it. The judge ruled that this question was inadmissible, and therefore no evidence was given as to the appellant's past character. Mr. Wild, who has argued the case for the appellant with great ability, says that though no answer was given, still the mischief was done when the question was put, and that the provisions of the Criminal Evidence Act, 1898, have been violated thereby, and that if an improper question is put, the judge ought to tell the jury to disregard it and not allow it to influence their verdict. It is argued that on that ground the conviction must be quashed.

We have first to examine whether as a matter of law the question

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was admissible. The judge's ruling that it was not admissible must not, in the opinion of the Court, be taken too literally. The judge may have thought, as a matter of discretion, that the question ought not to be put, but having heard the argument, we are clearly of opinion that, as a matter of strict law, the question was admissible, because the nature or conduct of the defence had been such as to involve imputations on the character of Berger, a witness for the prosecution. It may be said that counsel for the prosecution in opening the case had referred to Berger as a man of bad character; but the defence were not satisfied with what had been said by counsel for the prosecution, and attacked this witness in respect of matters other than those dealt with by the prosecution. On the authority of *Watson* the evidence is thereby made admissible; in that case Pickford J. said: "The general conclusion of the Court is that the appellant was not satisfied with the statement made that Childs was an accomplice, and possibly also that he was a man of bad character, but wished to elicit more in order that the jury should not accept his evidence. These were imputations within the meaning of the section." If we apply that principle here, it is clear to us that as soon as an attack was made on Berger upon matters other than those which had been opened by the prosecution, cross-examination as to the appellant's character became admissible under the statute. The Court is slow to allow any infringement of that section, which is intended to protect the accused, but we have to apply the law, and as the defence had opened the way to cross-examination as to character the prosecution were entitled to avail themselves of it. It must be borne in mind that the judge, in the course he adopted of ignoring the incident of the questions having been put, was acting in the interests of the prisoner, for if he had made a statement on the fifth day of the trial as to an incident which had happened on the third day the result might have been to draw the attention of the jury again to what might have been forgotten; and he might also have then felt it his duty to direct them on the absence of any evidence to support the statement made in his opening by counsel for the defence. The learned judge, in our opinion, was right in taking the view that it was best to let the matter pass without further comment.

The second ground of appeal is, that there was no corroboration of Berger, the accomplice. The judge undoubtedly took the view

that there must be corroboration. He so directed the jury, and said that it was for him to determine whether there was evidence in this case fit to be submitted to them as corroboration in the eyes of the law. In our opinion, this was a right direction, and so far no complaint has been made in reference to it. We have heard an elaborate argument on the doctrine of corroboration, but it is sufficient for this case to say, after considering all the authorities to which we have been referred, that we will assume for the purposes of this case, and without deciding it, that the test laid down in *Everest* is the right test to apply. We think that before the Criminal Appeal Act the true principle to apply was that, where corroboration of the evidence of an accomplice was required, as distinguished from corroboration under the provisions of a statute, the first was a rule of practice, and the second a rule of law. There are rules of practice which crystallize into rules of law, and certainly, although it was a rule of practice before the Criminal Appeal Act, there was abundant authority for the proposition expressed in *Stubbs* and in *Boyes*, that a judge ought to warn the jury carefully not to convict on the mere evidence of an accomplice, and also for the proposition that if the judge did warn the jury and the jury nevertheless convicted, the verdict could not be set aside. But where there is no corroboration in cases where it is required by statute, it is the duty of the judge at the end of the case for the prosecution to direct an acquittal.

Since the Criminal Appeal Act came into force there have been a number of cases dealing with this point, notably *Tate*, *Everest*, *Wilson*, and *Blatherwick*. Without going through these cases in detail, it is sufficient to say that *Everest* and *Wilson* seem to us to lay down the right principle, and that the practice of this Court is to require corroboration before it will allow a conviction to stand.

In the present case the judge said that there were two matters which amounted to corroboration, one relating to Powell, and the other to Collings. The rule which we propose to apply in this case is that most favourable to the appellant's contention. It is expressed by Darling J. in *Everest*, "The rule has long been established that the judge should tell the jury to acquit the prisoner if the only evidence against him is that of an accomplice, unless that evidence is corroborated in some particular which goes to implicate the accused." The evidence that is material on this

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point is that in 1895 Berger arrived in South Africa, and was introduced as a newcomer by Harvey, who was called, to Powell, who introduced him as such to the appellant. Berger and the appellant met again in 1896, and again in 1909 and 1910, from which time they remained on intimate terms until 1911. Bearing in mind the evidence of Harvey and Powell that Berger at that time looked from twenty-six to twenty-nine years old, we have to consider whether this introduction took place; and whether in 1911, when Berger was to give evidence as to what happened in 1879, the appellant could have believed the story that Berger was in Kimberley in 1879, and took part in that incident. Mr. Wild says that this could not be corroboration, because it amounts only to an introduction of Berger to the appellant in 1909 when, according to the prosecution, he must have cast his mind back to 1895, and from his recollection of the then appearance of Berger and of the incidents of that date, have reasoned out Berger's age in the year 1879, in which case he must have known that Berger's story was false. That is the question in dispute. On the other hand, it is said, when you remember that the appellant was resting his whole case on the evidence of Berger, can you believe that the appellant accepted Berger's story as true? He made no inquiries of any kind, which, in the peculiar circumstances of this case, supports the account given by Berger. No doubt, it may be that in ordinary circumstances a man pays little attention to an introduction, and might forget the details, but that relates to the value of the evidence. It was capable of being evidence in corroboration, and whether it was accepted as such was a question for the jury. A proper direction was given, and apparently the jury accepted the evidence. A further point was taken with reference to the Collings incident. It is sufficient to say that the judge did not give a very specific direction, but left the jury to decide which version was correct. There was ground on which he could leave it to them, and in any event, having regard to the way in which he left it, there is not sufficient reason for upsetting the conviction. The conclusion of the Court is that there was evidence to corroborate the accomplice, and that a proper direction was given.

Another point argued is that the evidence was so slight that, under the powers conferred on the Court by s. 4 of the Criminal Appeal Act, we ought to come to the conclusion that the conviction was against the weight of the evidence, and could not be supported.

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We are unable to come to that conclusion. If the jury decided that Berger's evidence was true, and that he fabricated the story at the instance of the appellant, we cannot interfere. No doubt there was independent evidence for the defence, but it is not very strong when examined; the witnesses came into Berger's life late in the story, and we cannot think that their evidence is sufficient to outweigh all the rest. We come to the conclusion that this appeal fails.

As to the sentence of three years' penal servitude, all we desire to say is that, bearing in mind the sentence on Berger, the very serious nature of the offence proved, and the fact that the appellant was responsible for it, it is impossible for us to interfere.

Appeal dismissed.

Solicitor for the Appellant—*Harry Wilson.*

Solicitors for the Prosecution—*Lewis and Lewis.*

A. L. B. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BANKES AND MR. JUSTICE AVORY.

JULIA DECIES.

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Severity of sentence.

The Court, in its discretion, will read a statement by an appellant who asks leave to depose as to its contents.

This was an application for leave to appeal against sentence. Appellant was convicted of wounding with intent to murder, at the Central Criminal Court, on the 4th March, 1914, before Darling J., and was sentenced to seven years' penal servitude.

George Elliott, K.C. (with him *Huntly Jenkins*), for the appellant, who was not present. The appellant shot the man with whom she had lived for some time with a revolver, and although such an act could not be justified, it was committed under great provocation, and while she was suffering from a sense of wrong and gross injustice at the hands of this man, who taunted her with his relationship with another girl. At the trial Mr. Huntly Jenkins expected the appellant to give evidence of what had happened before she committed the crime, but when it came to the point she refused to go into the witness-box; probably because she was in a state of collapse. She is now anxious to give evidence, and I ask leave to call her to speak to an incident of provocation which would be very material on the question of sentence. I have a signed statement of what she will say, which was made before the trial, and which was in the hands of Mr. Huntly Jenkins at the trial. [The statement was handed up, and was read by the Court.]

The LORD CHIEF JUSTICE, in giving judgment, said that if the suggested evidence had been given at the trial, when the defence

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argued that the proper verdict would be one of unlawful wounding, it would have pointed to the fact that the appellant's intention was to murder the injured man. She had bought the revolver early in the day before the taunts were uttered, and she shot the man while he was asleep. In these circumstances the Court could not say that the sentence was excessive.

Application dismissed.

Solicitor for the Appellant—*Harry Wilson.*

A. L B. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING, MR. JUSTICE BANKES, MR. JUSTICE AVORY, AND MR. JUSTICE ROWLATT.

VICTOR WOLFF.

An isolated incorrect passage in a summing up is not sufficient ground for quashing a conviction if the Court is satisfied that the jury appreciate the proper question for them.

Severity of sentence.

This was an appeal against verdict and sentence by leave of the full Court. Appellant was convicted of perjury, at the Central Criminal Court, on the 25th February, 1914, before Horridge J., and was sentenced to eighteen months' imprisonment with hard labour. The appeal was partly argued on the 30th March before the Lord Chief Justice, Bankes and Avory JJ., and on the 31st March it was ordered to be re-argued before a fuller Court.

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Rigby Swift, K.C. (with him *Macoun*), for the appellant, who was present. The occasion on which the appellant is alleged to have committed perjury was in an action of *Robinson* v. *Cohen and others,* which was tried before Grantham J., on the 21st and 22nd November, 1911. This was an action for libel contained in a book written by Cohen called "Reminiscences of Kimberley." Cohen justified, and also gave a notice in mitigation of damages alleging that Robinson's reputation was that of an illicit diamond buyer. The appellant gave evidence only on this last point, and his case is that he spoke as to matters of reputation and rumour, and not as to facts within his own knowledge. My submission is that there was no evidence given at his trial on which he could be convicted as stating things as facts which he knew to be untrue. He knew nothing about the action until September, 1911, when he says he met Cohen, whom he had known for many years.

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Cohen asked him if he knew anything about Robinson; he said he only knew his reputation, and he wrote on Cohen's behalf to the editor of a South African paper, which had published an article on Robinson's career, and asked for a copy of the paper containing this article. The paper did not come, and the appellant was served with a *subpœna* to give evidence in the action on behalf of Cohen. The evidence he gave was that at the end of 1870 or early in 1871 he was at Hebron, and that Robinson was on the other side of the river; he said, "I did not know Robinson at all, because he was not allowed to come on our side of the river." A few questions later he was asked what was Robinson's general reputation, and said, "He was not allowed to come on our side of the river; it was reputed that he had bought diamonds from our niggers who were working for us on our side." The appellant could only know that Robinson was not allowed to come on their side of the river if he had prevented him, or seen him prevented, from crossing, or had been a party to a resolution which forbade him to cross; none of these was the case, so he could have only been speaking to reputation on this point.

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Rigby Swift, K.C. (with him *Macoun*), for the appellant, who was present, first put forward the argument reported on the previous hearing. There were four assignments of perjury—(1) That in December, 1870, and January and February, 1871, Robinson was not at Hebron or on the Hebron side of the river; (2) that during the said months the diggers would not allow Robinson to be on the Hebron side; (3) that Robinson's general reputation was that he purchased diamonds from the negroes working for the diggers at that time on the Hebron side of the Vaal River; (4) that Robinson was not a member of the Diggers' Committee. Wolff's evidence either clearly shewed that he was speaking from hearsay, or at any rate the evidence was capable of bearing that meaning. It was consequently a serious misdirection for the learned judge not only to have omitted calling the jury's attention to the fact that Wolff's evidence was capable of bearing that meaning, and that that was a question for them to decide, but to have specifically told them that the evidence of the appellant as to Robinson not being allowed to land was a definite statement of fact.

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Gill, K.C. (with him *R. D. Muir*), for the respondent. The case for the prosecution was that either the appellant was not there at all, or that, if he was there, it was impossible he could have believed what he stated in evidence. Robinson was the first man to get to Vaal River, and was at the time in question the best known and most important man at Hebron, and continually there. The summing up must be read as a whole, and it is quite clear, both from the rest of the summing up and the defence, that the jury fully appreciated that the appellant's defence was that he was speaking from hearsay. He himself gave evidence that he had stated before Mr. Justice Grantham that he was only speaking from hearsay. That was contradicted by the shorthand writer, and by another witness. (He was stopped.)

Rigby Swift, K.C., in reply.

The LORD CHIEF JUSTICE: At the trial before Grantham J. the appellant was called as a witness. He made two statements of importance—(1) He did not know Robinson, because he was not allowed to come across the Vaal River; (2) He was not allowed to come because he was reputed to buy diamonds from the natives. Robinson must have been a well-known person in the district. Evidence was given that Robinson did come across, and did sit as a member of the Diggers' Committee. The substantial defence was that at the trial the appellant had not stated a fact of his own knowledge, but had merely repeated a rumour. This was a very definite issue of fact. Two witnesses were called, a shorthand writer and another, who denied that the appellant made any reference to "hearsay" when giving his evidence. Neither is there any reference to this in the notes of Grantham J. The material question was, did appellant believe the truth of the statements he made? Now, the judge told the jury that if they thought the appellant had made statements with the qualification that they were only matters of hearsay he should be acquitted. Then the learned judge, in reading over Wolff's evidence before Grantham J., and commenting on the words, "He was not allowed to land," did put that to the jury as a statement of fact. He did not tell the jury it was still open to them, if the words were taken literally, to find that the appellant was only purporting to speak from hearsay. This passage, however, must be taken in con-

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junction with the rest of the summing up and of the defence. An absence of special reference to the other interpretation is not enough to cause this Court to quash the conviction if we come to the conclusion, reviewing the summing up as a whole, that the learned judge drew the jury's attention to the material difference between the prosecution and the defence as to the interpretation to be placed on the words. Although we think it would have been better to put the alternative as a possible interpretation, if the jury chose to accept it, when the judge dealt with the particular passages, we are satisfied that he directed them in earlier and later passages of the summing up, sufficiently upon the point.

With reference to the sentence, it is not the policy of this Court to interfere if its members are of opinion that they would have given a less sentence, but only if the sentence appealed from is manifestly wrong.

Appeal dismissed.

Solicitor for the Appellant—*J. K. Torkington.*

Solicitors for the Respondent—*Lewis & Lewis.*

H. S.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BANKES AND MR. JUSTICE AVORY.

CHARLES VICTOR SMITH.

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31 *March.*

Severity of sentence.

This was an appeal against sentence by leave of Lord Coleridge J. Appellant was convicted of soliciting for immoral purposes, at the County of London Sessions, on the 10th March, 1914, before the Deputy-Chairman, and was sentenced to fifteen months' imprisonment with hard labour, and twenty-five strokes with the cat.

Appellant in person.

Felix Davis, for the Crown.

The LORD CHIEF JUSTICE: The appellant was convicted of soliciting for immoral purposes. It appears that at ten minutes to one in the morning he was seen by a police-constable to accost an elderly man, and on the evidence there is no doubt that he was soliciting. There was also evidence as to another occasion. The facts were properly placed before the jury, and on conviction by them it was necessary to pass a severe sentence, as he had twice before been convicted of similar offences. The decision of the Court is that the sentence of fifteen months' imprisonment with hard labour stand, but that the flogging be reduced from twenty-five strokes to fifteen.

Sentence reduced.

A. L. B. T.

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JAMES THRELFALL.

On an indictment for perjury or subornation of perjury, a jury is entitled to treat a document consistent with the guilt or the innocence of the accused as corroboration of the evidence against him.

S. 13 *of* 1 & 2 *Geo.* 5, *c.* 5, *the Perjury Act*, 1911, *explained.*

This was an appeal against conviction on a point of law. Appellant was convicted of subornation of perjury, at the Chester Assizes, on the 26th February, 1914, before Rowlatt J., and was sentenced to four months' imprisonment in the second division.

Rigby Swift, K.C. (with him *G. W. H. Jones*), for the appellant, who was not present. The appellant is a milk dealer, who has been in business for twenty-five years without any complaint having been made against him previously. In March, 1913, he entered into an agreement with a Mrs Hughes, by which she was to supply him with milk daily, with a written warranty. On the 18th June, 1913, milk was delivered under this contract at one of the appellant's shops, at which he was not present at the time; a sample of the milk was taken by an inspector, and was found to contain seven per cent. of added water. On the 7th July he was served with a summons, and on the following day he went to see Mrs. Hughes; he found that her refrigerator had been recently repaired, and arranged for her to come to Court when the summons came on for hearing. On the 18th July notice was served on Mrs. Hughes and the prosecution by the appellant that he intended to rely on the defence that the milk was supplied to him with a written warranty. The case was heard on the 23rd July, and Mrs. Hughes was not called as a witness for the appellant, but the statute gives a person supplying milk with a warranty a right to take part in the proceedings when such a defence is raised, and she elected to give evidence. She swore that her refrigerator had been out of order, and had been repaired in the middle of June; it was suggested that owing to the leak the water had trickled into the milk. The case against the appellant was dismissed, and a summons was taken out against Mrs. Hughes for selling milk with a false warranty; this case was heard on the 24th September, and the summons was dismissed, but it appeared from her evidence that the refrigerator had in fact been mended

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on the 6th June, and was in a good condition on June 18th; when taxed with her previous evidence, Mrs. Hughes said that the appellant persuaded her to say that it was not repaired until after the 18th June. Mrs. Hughes was then indicted for perjury, to which she pleaded guilty, and then the appellant was charged with suborning her to commit this perjury, and was convicted.

The main ground of appeal is that there was no corroboration of Mrs. Hughes's story. When the appellant went to see Mrs. Hughes on the 8th July, he was accompanied by a friend of his named Hollins, and he said that Mrs. Hughes was then unable to say exactly when the refrigerator had been repaired; he asked her to get the receipt, and she said she would send it on. On the 9th July Mrs. Hughes wrote to the appellant a letter which was not forthcoming at the trial, but in which she says she told him that the repairs were done on the 6th June. The appellant and Hollins swore that there was no mention of a date. She said that she enclosed some tickets of analyses taken of her milk. In answer to this the following letter was written to Mrs. Hughes by Hollins on behalf of the appellant on the 11th July. Hollins said that the appellant told him to write the letter, but that the wording was his own.

"DEAR MADAM,

"I am very much obliged to you for your kind letter of the 8th instant, and the information therein contained. I take this opportunity of thanking you for your courtesy on my visit to you on Tuesday. Arising out of that visit and interview, and your letter, there are certain facts upon which I should like to have a further talk with you, and to do so I would come over to Wrexham on Monday next, arriving at the Gt. Central Rly. Station at 3.40 in the afternoon. I hope it will be convenient for you to meet me there at that time. If not, would Tuesday suit? I propose Wrexham, as I think it would be better than my coming to the farm again. A few lines from you in reply by return would oblige."

The only corroboration suggested was the inference to be drawn from this letter, and from a later interview. At the interview at Wrexham Station it was arranged that Mrs. Hughes should attend at the police court; this was not unnatural, and the circumstances are quite as consistent with the innocence of the appellant

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as with his guilt. There is nothing in the letter of the 11th July which made it more probable that Mrs. Hughes's account of the contents of her letter was true than that given by the appellant and Hollins.

Before the summons was issued against Mrs. Hughes on the 12th September, the appellant heard of it, and on the 8th September he wrote to her, telling her of it, and adding, "As this is a matter which affects me as well as you in our business relations, I think it would be the right thing for us to confer upon this matter, and I should be pleased to meet you at Wrexham (Central) Station on Saturday afternoon next, at about a quarter to four o'clock." The appellant had an interest in not giving further publicity to the fact that he had sold adulterated milk. He received no answer to this, and on Sunday, the 14th September, he and Hollins walked some seven miles to Mrs. Hughes's farm; she was out, and he left a letter asking if she had engaged a solicitor, and adding that, as he would have to be legally represented, it would be a saving of expense if she employed the solicitor who had represented him at the previous hearing. There is no other suggested corroboration, and it would be most unsafe to convict a man of excellent character, supported by Hollins, who also bore an excellent character, on the evidence of a woman who has already sworn falsely once, and who only implicated him when in a difficulty herself, even if there be a scintilla of corroboration.

By s. 13 of the Perjury Act, 1911 (1 & 2 Geo. 5, c. 6), "A person shall not be liable to be convicted of any offence against this Act, or of any offence declared by any other Act to be perjury or subornation of perjury, or to be punishable as perjury or subornation of perjury solely upon the evidence of one witness as to the falsity of any statement alleged to be false." The section is not altogether easy to interpret.

[AVORY J.: The meaning is this: it used sometimes to be said that there must be two witnesses; this was a delusion; the evidence of one witness and a confession may be enough, and the section has been drafted so as to make this clear. One witness can prove that the person charged swore to certain statements, but more than the evidence of one witness is required to prove that the statements were false.]

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In subornation of perjury the person suborning must know that what is sworn to is false, and it is not clear from the section whether corroboration is required on this point also. It was admitted that what Mrs. Hughes swore to was false, but the other question is equally essential to a conviction, and corroboration should be required as to it.

The judge in his summing up did not tell the jury that by statute corroboration was necessary on a charge of perjury, but he did warn them against convicting on the uncorroborated evidence of an accomplice. He did not, however, direct them that it must be some fact which implicates the accused.

Artemus Jones, for the respondent, was not called upon.

The LORD CHIEF JUSTICE: The appellant was convicted of subornation of perjury, and was sentenced to four months' imprisonment in the second division. The facts, so far as they are material, can be shortly stated. The appellant was a dairyman, and was in the habit of purchasing milk under an agreement from Mrs. Hughes, who had a farm a few miles from Wrexham. On the 7th July, 1913, an information was sworn against him for selling milk containing seven per cent. of added water, and on the 8th July he and Hollins went to Mrs. Hughes' farm. There was some discussion, and, in substance, it was suggested that the refrigerator leaked, and that in consequence water had in some way got from the refrigerator into the milk, and so caused the addition. If this was true, it afforded a good defence to the appellant under his warranty, and established the fact that he had not added the water. At the interview it was said by Mrs. Hughes that the refrigerator was repaired about the middle of June; it had been mended by the 8th July, and the material question was whether it was repaired before or after the 18th June. Before leaving with the appellant Hollins asked to see the receipt for the repairs, and when they left she said she would send it on. It appears that on the 12th July the appellant gave notice that he intended to rely on the defence that he bought the milk with a written warranty; on the 23rd July the information was heard, this defence was raised, and the persons through whose hands the milk had passed were called; Mrs. Hughes also gave evidence,

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as she was entitled under the Act. As a result the charge against the appellant was dismissed.

The question which arises is not whether Mrs. Hughes's evidence was true, for she admitted that it was not. She was summoned for selling milk under a false warranty, and said she had been told by the appellant to tell the story. The question that is material turns on the events of July, after the appellant's visit to the farm, after the summons had been served, and after, according to her, she had written a letter to the appellant telling him that the 6th June was the date on which the repairs were done. If her statement as to the contents of the letter is true, it is clear that the leak did not cause the addition of the water, and that the appellant knew that it did not. If it is established that she wrote the letter giving the date of the repairs as the 6th June, and if that statement by her is corroborated, it is clear that the Court would not interfere with the conviction. That letter could not be produced, but a letter written in answer to it was produced, upon which a great deal turns. It was written by Hollins for the appellant, making an appointment for Mrs. Hughes to meet him at Wrexham Station; it has been read more than once in the course of the argument, and it contains curious expressions. In effect, there was material in that letter on which the jury could be asked whether it was more consistent with the guilt or the innocence of the appellant. It has been argued that it was equally consistent with his innocence; that is not our view. It was capable of an innocent interpretation, but the question of law is whether the letter amounted to corroboration of Mrs. Hughes, that is, whether there was evidence of corroboration fit to be submitted to the jury. The judge thought that there was, and in four passages in his summing up pointed out the necessity for corroboration of her evidence.

There were subsequent events, a letter and an interview, in which the appellant said he must be represented in proceedings in which he no longer had an interest. Mr. Swift says that this is consistent with his innocence; of course it is, but the question is whether the jury could draw the inference that it pointed to his guilt. We are all of opinion that there was abundant evidence of corroboration, and even if the law is that the evidence must be such as implicates the accused (and I do not say that it is), it does not avail the appellant here. Without attempting to decide the

question whether *Everest*, 73 J. P. 269; 2 Cr. App. R. 130 (1909), or *Wilson*, 6 Cr. App. R. 125 (1911), is correct, and assuming that *Everest* is correct, which is the view most favourable to the appellant, we think that there was still corroboration.

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The point taken under the Perjury Act, 1911, is really the same point. The section has been explained by Avory J. in the course of the argument, and amounts only to this, that there can be no conviction on the evidence of one witness alone; there must be one witness and something else in addition; there was something else here, and so the appeal fails.

Appeal dismissed.

Solicitor for the Appellant—*J. M. Voss* for *J. P. Whittingham*, Nantwich.

Solicitor for the Respondent—*H. W. Cook*, Wallasey.

A. L. B. T.

ARCHIBALD KING.

6 *April.*

A woman is not necessarily the accomplice of a man convicted of living on her immoral earnings: but it is proper to warn the jury trying him, to be cautious in accepting her evidence.

Severity of sentence.

This was an appeal against conviction and sentence by leave of Lord Coleridge J. Appellant was convicted on two indictments of living on the earnings of prostitution, at the County of London Sessions, on the 26th February, 1914, before the Deputy-Chairman, and was sentenced to twelve months' imprisonment with hard labour on each indictment, the sentences to run consecutively. Leave to appeal was given as to the conviction and sentence on one indictment only.

Hawtin for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The question in this appeal is whether the evidence of the prosecutrix ought not to have been corroborated; the only suggested corroboration was evidence that on being charged the appellant said, "Quite right." He explained that he had anticipated the charge, as he knew that the prosecutrix had threatened to prosecute him. In any case, the answer was of an ambiguous character, but the Deputy-Chairman treated it as

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an admission of his guilt in his summing up. Corroboration was necessary as the prosecutrix was an accomplice; if it was a fact that the appellant lived on her immoral earnings, she must have been guilty of soliciting, which is an offence under the Metropolitan Police Act, 1859, s. 54 (11).

An analogy may be drawn between the present case and the offence of stealing and receiving, which are two separate and distinct offences. It has been held that when the only evidence against the receiver was that of the thief, corroboration of such evidence was necessary, as the thief was clearly an accomplice.

[AVORY J.: Suppose the thief, instead of handing the stolen property directly to the receiver, delivered it to a third person. Would he in that case be an accomplice ?]

Possibly not; but there is a close analogy between the case of a man living on the proceeds of prostitution, which presupposes that those proceeds are obtained by soliciting, and the offence of receiving directly from the thief the stolen goods.

[The LORD CHIEF JUSTICE: Your difficulty is that neither by statute nor at common law is corroboration required in a case of this kind.]

I recognise that difficulty, unless it can be said that in the Criminal Law Amendment Act, 1885—the present offence being punishable on indictment under the Criminal Law Amendment Act, 1912—there are certain sections creating offences of a sexual nature which expressly require corroboration. But I rely on the analogy which I have already submitted for the consideration of the Court. This offence is of so repulsive a nature in the eyes of all right-thinking persons, that an ordinary jury would be likely to be prejudiced against a prisoner, and corroboration of a witness, such as the prosecutrix, is desirable.

The sentence was excessive, as the appellant had not previously been convicted, and had led a respectable life up to 1913.

Roome, for the Crown (who was called upon on the question of sentence only). It was proved that the appellant had lived on the earnings of two women within twelve months.

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The LORD CHIEF JUSTICE: The appellant was convicted of living on the earnings of prostitution, as to one woman between certain dates, and under a second indictment as to another woman during the succeeding period. He was found guilty and sentenced to twelve months' imprisonment with hard labour on each indictment, the sentences to run consecutively. Leave to appeal was given in order that the question as to the necessity for corroboration in such a case might be raised. Mr. Hawtin has pointed out what was the material corroboration in this case, namely, that when arrested he said, in answer to the constable who told him what he was charged with, "Quite right." This was taken to be an admission, and the jury were so directed. No doubt there was some evidence of an admission. In their literal meaning the words amount to that, and the jury were quite capable of deciding in what sense they were used. It is impossible not to say that there was some corroboration; the Deputy-Chairman pointed out, it is true in general language, that it was necessary to have corroboration of any girl's evidence, especially as to a story such as this. Mr. Hawtin argues that she was an accomplice, that must be in the offence with which the appellant was charged. It is sufficient to say that there is no evidence of this, and it is not necessarily the case. The only way in which it is possible to argue the case is to say that in doing some of the acts, which she must have done to carry out the intention of the appellant, she must have been guilty of soliciting or of some other offence. It is impossible to say that she is therefore an accomplice in the crime with which the appellant was charged.

Then it is said that the Court should lay down the rule that there must be corroboration, and that the jury must be so cautioned. The Court thinks it is impossible to lay down such a rule, there is nothing in the statutes or in the common law to justify it. The only way in which it was possible to argue the point was on the analogy of other offences which are statutory, where by the statute creating the offence corroboration is required. It would be most dangerous for the Court to lay down such a rule; we are here to administer the law, not to make it. On the other hand, the judge is justified in warning the jury against accepting the evidence of a girl who is leading such a life against a man, without corroboration. That is a matter for the discretion of the

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judge, and in the present case such a warning was given. The appeal against conviction must therefore be dismissed.

As to sentence, the effect of that passed is that the appellant will serve two years' imprisonment with hard labour. Upon the whole, taking into account what little can be said for him, and bearing in mind that the sentence must be severe, the Court reduces it to a total of eighteen months' imprisonment with hard labour, twelve months' on the first indictment, and six months' on the second, to run consecutively.

Sentence reduced.

A. L. B. T.

HARRY MAYO BARTHOLOMEW.

Severity of sentence.

This was an appeal against sentence by leave of Lord Coleridge J. Appellant was convicted, at the Bristol Assizes, on the 21st February 1914, before Mr. Commissioner English Harrison, of gross indecency with a male person, and was sentenced to twenty months' imprisonment with hard labour.

Appellant in person. My parents are ill. I have never been charged with any offence before. My age is nineteen.

R. E. Dummett, for the Crown. There was evidence on the depositions that the appellant had approached two other boys with similar suggestions. It is true that no evidence of character was given after conviction, but this was because the matter was in the mind of the Commissioner, there having been a discussion whether the other charges should be proceeded with.

BANKES J.: The appellant was convicted of gross indecency with a male person, and was sentenced to twenty months' imprisonment with hard labour; leave has been given to appeal against that sentence. It is not necessary, nor is it desirable, to go into the facts of the case; the offence was committed with a little boy, and the circumstances are extremely discreditable to the appellant

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Bankes J.

In the opinion of the Court, however, justice will be met if the sentence is reduced to one of six months' imprisonment in the second division.

Sentence reduced.

A. L. B. T.

SIDNEY HAMMERSON.

When any valuable thing is obtained by false pretences, primâ facie *there is an intent to defraud.*
Severity of sentence.

In this case the appellant appealed against his conviction, on the 10th March, 1913, before the Chairman of the Middlesex Sessions, on three counts of obtaining money by false pretences, and sentenced to two terms of imprisonment of six months each, with hard labour, to run consecutively, and to one day's imprisonment on the third count.

The appellant had called on various private individuals, to whom he had falsely represented that he was a teacher of the London County Council School of Arts and Crafts, Camden Town; and also that in order to advertise the school the pupils were prepared to execute coloured portraits from photographs free of charge. By these means he had obtained various photographs from the people on whom he called, which in some cases he had returned to them accompanied by water-colour drawings. He had obtained no money in respect of these water-colour drawings. He had, however, induced the people on whom he called to give him money for frames, which he said would be made at the school, representing that the money was only applied to cover the cost of the materials. In some cases the frames were in fact supplied; in other cases they were not.

Samuel Duncan for the appellant, who was present. This is a case both of misdirection and non-direction. The jury were not directed whether or not there was any intent to defraud. The Chairman was wrong in telling the jury that they must convict if they believed the false pretences were made.

There can be "false pretences" without any "intent to

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SIDNEY HAMMERSON.

Reading L.C.J. Bankes J. Avory J.

defraud." It is not sufficient to tell the jury that the only question is whether or not the false pretences were made.

Regard must be had to the facts of the case subsequent to the making of the false pretences; it is from those facts, and especially from the subsequent conduct of the defendant, that the inference of an intention to defraud is usually drawn.

If the jury had been properly directed on these facts they might have found that although the false pretences were made the defendant had no intention to defraud. It is true the Chairman used the words "intent to defraud" twice in his summing up, but that is not sufficient. The minds of the jury were never specifically directed to that question. The sentence was too severe, there was nothing previously against the defendant.

The fact that value was given for the monies obtained shews that there was no intent to defraud.

Roome, for the Crown, was not called upon.

BANKES J.: In this case the appellant appeals against his convictions and two sentences of six months' imprisonment with hard labour. He was indicted in three counts charging him with three separate offences of obtaining money by false pretences. The false pretences were that he was a teacher at a school of art, known as the Camden Town School of Arts and Crafts, that the school was in receipt of a grant from the London County Council, who would not allow the school to advertise in the paper, and that the only way in which orders could be obtained was to take round samples of the work. In this way he induced a Mr. Shovelton to order a water-colour drawing of a member of his family, and afterwards to get a frame in pursuance of an order. The learned counsel has contended that there was no intent to defraud here, because the prosecutor got something which was of real value for his money. In our view that is a misconception. Where money is obtained by pretences that are false, *primâ facie* there is an intent to defraud. This presumption, it is true, may be displaced; but here there was no suggestion of this, except the fact that value was given. When the learned Chairman was summing up the case to the jury he did deal to some extent with the contention of the learned counsel for the defence. Looking at the summing up, it is impossible to contend that the real question was not properly

put before the jury, and that they were not fully cognisant of it. There was no ground here for suggesting misdirection. But we think the two sentences of six months to run consecutively were too severe. We reduce it to one sentence of six months' imprisonment with hard labour.

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SIDNEY HAMMERSON.

Bankes J.

Sentence reduced.

C. G. M.

Solicitor for the Appellant—*J. de Meza.*

JOHN THOMPSON.

7 *April.*

Mitigation of sentence, partly in view of appellant's age.

This was an appeal against sentence and conviction as a habitual criminal, at the County of London Sessions, on March 11th, 1914, before the Deputy-Chairman: Appellant pleaded guilty to stealing two gold purses of the value of £10 from a shop in Regent Street, and was sentenced to three years' penal servitude and seven years' preventive detention

Appellant in person.

F. W. Hoole, for the Crown. The duration of the sentence of preventive detention depends entirely on appellant's conduct.

The LORD CHIEF JUSTICE: The appellant pleaded guilty to a charge of larceny, and he was then convicted of being a habitual criminal. He was sentenced to three years' penal servitude and to seven years' preventive detention. On February 4th last—when he had been out of prison two months, and was a convict on licence—the appellant went to a wholesale jeweller, and saying that he carried on a small business as a jeweller, selected £200 worth of purses on sale or return. Before they were sent two of the purses of the value of £10 were missed. To the charge of stealing these he pleaded guilty. On the trial as a habitual criminal the three statutory convictions having been proved, it was shewn that he was released from prison on December 5th of last year (1913). There were five previous convictions. He

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JOHN THOMPSON.

Reading L.C.J.

had already served two terms of three years' penal servitude, one in 1908, and another in 1911 for receiving stolen goods, and another offence. The jury were properly directed in the case by the Deputy-Chairman, and we see no reason to interfere with that verdict. But this man was sentenced to three years' penal servitude, to be followed by seven years' preventive detention. He is sixty-two years of age, and he appears to have lived a life of crime during the last eight years, from 1903 to 1911; but there are no convictions against him before that date, so that for fifty years of his life there is no record of his having committed any offence. If he served the full term of ten years in all, he would be seventy-two years of age when he is released. We think this is a very special case, and looking at all the circumstances of the case, and to the fact that he does appear to have tried to live honestly for a short time, and there is evidence that he did some work, we reduce the sentence of three years' penal servitude to one of eighteen months' imprisonment with hard labour. As that sentence will not support the conviction as a habitual criminal, that conviction must be quashed.

Primary sentence reduced.

Conviction as habitual criminal quashed.

C. G. M.

BEFORE

MR. JUSTICE RIDLEY, MR. JUSTICE BRAY,
AND MR. JUSTICE LUSH.

LEWIS ROBERT VARLEY.

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When a photograph is produced on a trial for the purpose of identification, care should be taken that the jury should not know that it has been produced by the police.

This was an appeal against a conviction for obtaining property by false pretences, at the Leeds Assizes, on March 20th, 1914, on which the appellant was sentenced, by Bankes J., to nine months' imprisonment with hard labour. The appellant also appealed against his sentence; both appeals were brought by leave of the Court.

Willoughby Jardine for the appellant, said that the appellant was indicted for obtaining money by false pretences. The case for the prosecution was that at 3 p.m. on February 23rd last the appellant went to a silversmith's shop at Sheffield, and obtained property on the false pretence that he was sent there by the Park Club to obtain articles, one of which was to be presented to a Mr. Johnson, and that he subsequently, between 3 and 4.30 p.m. on that day, pawned the property at three pawnshops in Sheffield. The question at issue was that of identification. Neither the silversmith nor the girl in his shop was able to identify the prisoner (who was arrested on March 12th) as the man who had taken away the articles. The girl said that the man who came into the shop had a very dark thick moustache. All three pawnbrokers identified the appellant as the man who had pawned this property with them. They identified him first by picking out one of a number of photographs, and afterwards in person, two of them by picking the appellant out of a number of men. Parkin, one of the pawnbrokers, said that when he first saw him he had a very heavy moustache; on arrest it had been

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clipped in,—"smarter." A detective officer said that on February 27th he saw the appellant in Bradford, when he had a fairly heavy moustache; since then it had been clipped short.

The defence was an *alibi*. The appellant was called, and said that he pawned his watch on February 23rd, at about 2.30 p.m., at 968, Manchester Road, Bradford, and he had remained in Bradford all that afternoon. He said he had had his moustache shaved off about a month or five weeks before the date of trial (March 20th) by a Mr. Tempest, of Main Street, Wisbey. A Mr. Newell, pawnbroker's assistant, proved that on February 23rd, between 2.15 and 2.40, the appellant pawned his watch in the name of George Askwith, at Manchester Street, Bradford. He produced his book of pledges shewing the entry; there were twenty-five entries after, and twenty-three before that of Askwith on that date. He went away to a sale of pledges just after the appellant had pledged his watch. They always had the sale about 2.30 p.m. The next entry after that of Askwith was that of Mary Hinchcliffe, and the next that of Sarah Jane Slingsby, who was a witness, and proved that she made a pledge at this shop between 2.30 p.m. and 2.45 on February 23rd. Tempest was called, and proved that he shaved the appellant's moustache off on February 5th. The appellant's father also proved that the appellant was in Bradford about 4 to 5 p.m. on February 23rd. To get to Sheffield by 3 p.m. a man would have to leave Bradford about 12.30 p.m. At the police-court the appellant said he pawned the watch in Bradford at 11.30 a.m.

The identification of the pawnbrokers was made in the first place from photographs. The photograph that was recognised by the pawnbrokers was handed up to the Bench from the custody of the police. The photograph was on a piece of paper, which no doubt contained details of the appellant's career. This was torn off from the photograph by the judge before he handed the photograph to the jury. In a case such as this, where the evidence was so nicely balanced, in all probability the production of the photograph from the custody of the police turned the scale against the appellant. (He was stopped.)

Horace Wilson, for the Crown. There was abundant evidence for the prosecution upon which the jury could act; all three pawnbrokers identified him, and if his own first story was correct that

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he had pawned his watch at Bradford at 11.30 a.m. he had abundant time to get to Sheffield by 3 p.m.

RIDLEY J.: The Court thinks that on the whole this conviction ought to be quashed—not so much on the ground of the production of the police photographs, although it is true that great caution should be taken where photographs taken by the police are produced. It is almost impossible that the jury will not be influenced by the fact—which they may infer—that the prisoner is known to the police. Here the production of the photograph would not of itself have been sufficient ground to force us to the conclusion at which we have arrived. The case against the prisoner consisted of the evidence of the pawnbrokers, who without comparing notes with each other, did identify the prisoner. They had seen the photograph which shewed him in a bushy moustache, and they said he had a moustache when they saw him. Perhaps they said this to justify their recognition of the photograph. It was apparent from the evidence that at the material time the appellant had not a heavy moustache. This, of course, does throw some suspicion on their evidence. But it is the evidence of the *alibi* which makes me think it doubtful whether the conviction ought to be supported—especially the evidence of Newell. And there was other evidence strongly in favour of the *alibi*. We think, therefore, that in a case where the evidence was so nicely balanced we ought to give some weight to the possibility that the production of this photograph may have influenced the jury and turned the scale. The conviction therefore will be quashed.

Conviction quashed.

C. G. M.

Solicitor for the Appellant—*J. W. Fenoughty*, Sheffield.

IN THE HOUSE OF LORDS.

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FELSTEAD ..... *Appellant.*

and

THE DIRECTOR OF PUBLIC PROSECUTIONS (on behalf of His Majesty) ..... *Respondent.*

Coram: The Lord Chancellor, Lords Dunedin, Atkinson, Moulton, and Parker, and Lord Reading C. J.

A "special" verdict found under the Trial of Lunatics Act, 1883, is an acquittal, and therefore cannot be appealed from. Machardy, 6 *Cr. App. R.* 272, (1911) *approved*; Ireland, 4 *Cr. App. R.* 74, 87, (1910) *overruled. Order of the Court of Criminal Appeal* (9 *Cr. Ap. R.* 228) *affirmed.*

Appeal from an Order of the Court of Criminal Appeal (9 Cr. App. R. 227; 30 T. L. R. 143).

C. A. McCurdy (with him *Bowyer*) for the appellant. The question raised by this appeal is whether a person whom the jury have found to be guilty of the act charged against him, but insane at the time when he did the act, under the Trial of Lunatics Act, 1883, 46 & 47 Vict. c. 38, can appeal to the Court of Criminal Appeal against the finding of insanity.

The appellant was indicted for inflicting grievous bodily harm, with intent so to do, on his wife with a hatchet. He was committed for trial on a Thursday, and his solicitors were only communicated with after business hours on the Saturday; the trial took place on the Monday, and was begun in the morning before counsel was briefed. Two witnesses were called for the prosecution, and were cross-examined by the appellant with a view to shewing that the act was unintentional, and that therefore the proper verdict would be one of unlawful wounding. During the

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luncheon adjournment I was briefed for the appellant, and without any knowledge of the line of cross-examination set up by him, I cross-examined whether he had not already been confined in a lunatic asylum, and asked the jury to find him insane. The learned judge summed up on this issue, and made no reference to the line of defence indicated by the appellant. The jury found him "guilty but insane," and he now wishes to appeal against the finding of insanity. Leave to appeal against this part of the finding of the jury was granted by Atkin J., sitting as a single judge of the Court of Criminal Appeal, under s. 17 of the Criminal Appeal Act. The appeal came before the Court of Criminal Appeal, consisting of the Lord Chief Justice, Bray and Lush JJ., on the 1st December, 1913, when the appeal was dismissed on the ground that the Court was bound by a previous case: *Machardy*, (1911) 2 K. B. 1144; 80 L. J. K. B. 1215; 105 L. T. 556; 55 S. J. 754; 28 T. L. R. 2; 6 Cr. App. R. 272, in which it was held that there was no appeal from a finding of insanity. The question now to be decided is whether that decision was correct; if the appeal succeeds here the case will, I assume, be sent back to the Court of Criminal Appeal to be dealt with on the merits.

Under s. 3 of the Criminal Appeal Act, "A person convicted on indictment" may appeal under this Act to the Court of Criminal Appeal against conviction on a question of law without leave, and on other grounds with leave. To succeed in this appeal it is therefore necessary for me to satisfy the House that the appellant has been convicted on indictment.

I submit that a verdict returned under the Trial of Lunatics Act, 1883, s. 2, amounts to a finding, to adopt the language of Lord Denman C. J. in *Oxford*, 9 Car. & P. at p. 550 (1840), "that that act has been done by the prisoner which fixes him as a criminal unless he is a lunatic."

In the earliest days insanity was never a defence; it was regarded merely as a ground which relieved the prisoner from his responsibility for a crime which he had committed. A special verdict that he committed the crime when mad gave him a right to a pardon. The same course was taken when the defence was killing by misadventure or in self-defence. See Stephen's History

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of the Criminal Law of England, c. 19, Vol. II., p. 151, citing 1 Rot. Par. 444b, 3 Edw. 2 (1310). At a later stage, and until 1800, a prisoner who was found to be insane at the time he committed the act charged was entitled to an acquittal. See 30—37, 1 Hale's Pleas of the Crown.

During that period, I submit, the prisoner was found not guilty not on the ground that intention was negatived, but on the principle of English law that a person who was suffering from *dementia*, which was not brought on by his own act, was excused from responsibility for any crimes committed by him while so suffering.

Then came the Criminal Lunatics Act, 1800, 39 & 40 Geo. 3, c. 94, which was headed, "An Act for the safe custody of Insane Persons charged with Offences," and which enacted that in future where a jury acquitted a prisoner on the ground of insanity they should be required to find specially that the person was insane at the time of the commission of the offence, and that such person was acquitted by them on account of such insanity; the prisoner was then ordered to be detained during His Majesty's pleasure. Until then there was no right to commit a person to a lunatic asylum who was acquitted on the ground of insanity. The language of the statute was discussed in *Oxford*, where it was argued on behalf of the Crown that even if the jury found that the prisoner did not commit the offence, but also found that he was insane, the Court must order him to be kept in custody until His Majesty's pleasure be known, but the judges expressed opinions to the contrary, Alderson B. saying to Campbell A.-G., "The construction you contend for would lead to this, that if a man were charged with an offence, and the jury thought that no offence had been committed at all, yet he must be handed over to the mercy of the Crown perhaps for his life." A lunatic did not lose his right to an absolute acquittal on the ground that there was no *mens rea*, in charges where *mens rea* was an essential element in the offence. *Stokes*, 3 Car. & K. 185 (1848); and *Davies*, 1 F. & F. 69 (1858).

The procedure is now regulated by the Trial of Lunatics Act, 1883, 46 & 47 Vict. c. 38, s. 2 (1), which is, "Where in any

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indictment or information any act or omission is charged against any person as an offence, and it is given in evidence on the trial of such person for that offence that he was insane, so as not to be responsible, according to law, for his actions at the time when the act was done or omission made, then, if it appears to the jury before whom such person is tried, that he did the act or made the omission charged, but was insane as aforesaid at the time when he did or made the same, the jury shall return a special verdict to the effect that the accused was guilty of the act or omission charged against him, but was insane as aforesaid at the time when he did the act or made the omission." Under s. 2 (2), "Where such a special verdict is found the Court shall order the accused to be kept in custody as a criminal lunatic in such place and in such manner as the Court shall direct till Her Majesty's pleasure shall be known;" the expression "criminal lunatic" suggests that the lunatic has been convicted of a crime. Where to constitute a crime an act has to be done with some special intent, and the jury find that the prisoner did that act, but not with the intent, they could not properly return a special verdict; it is therefore not a mere colourless act, but an act which is a crime which the jury find the prisoner to have committed. The practical test whether a finding by the jury amounts to a conviction is whether the prisoner was given in charge of the jury, whether the jury came to certain findings, and whether as a result of those findings the prisoner lost his liberty. The policy of the law now is to allow an appeal in all cases where there has been misdirection or a mistake in fact; a man ought not to be deprived of this right because he is deprived of liberty as a criminal lunatic if he has been improperly so found.

The Court of Criminal Appeal has held that a special verdict is a conviction. *Ireland*, (1910) 1 K. B. 654; 79 L. J. K. B. 338; 102 L. T. 608; 74 J. P. 206; 54 S. J. 543; 26 T. L. R. 267; 4 Cr. App. R. 87. Rule 4 (d) of the Criminal Appeal Rules, 1908, provides for notices to be signed by the solicitor or some other authorised person "where on the trial of a person entitled to appeal under the Act, it has been contended that he was not responsible, according to law, for his actions on the ground that he was insane at the time the act was done." In *Machardy* the Court held that there was no appeal from that part of the verdict

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which finds the defendant to be insane. *Hill*, 28 T. L. R. 15; 7 Cr. App. R. 26 (1911), does not carry the matter any further, but Darling J., in giving the judgment of the Court, said that the decision in *Machardy* was not very easy to understand, and they would be glad if it could at some time be reconsidered by a higher Court.

"Convicted" means originally "found guilty of an offence by verdict or upon confession," but the word is equivocal. See Stroud's Judicial Dictionary. The Court of Criminal Appeal has held that "guilty of the act charged" means guilty of the offence charged, and that is the only possible meaning. When these words are used in the special verdict, and the result of the verdict is that the defendant is deprived of his liberty, it is clear that "found guilty" and "convicted" are synonymous terms.

The question of *mens rea* was dealt with in *Tolson*, 23 Q. B. D. 168; 58 L. J. M. C. 97; 60 L. T. 899; 37 W. R. 716; 16 Cox C. C. 629; 54 J. P. 4; C. C. R. (1889), where Stephen J. said, "The expression is likely to, and often does, mislead." There may be *mens rea*, for instance, in a case of rape, where there is an intention to have connection; but, none the less, the defendant may be found insane. In Russell on Crimes, 7th ed., p. 67, some directions given by judges on the question of insanity are quoted; these are very different from directions on the subject of *mens rea*.

It is not necessary for me to shew that the obvious construction of the statute is to give an appeal in this class of case; it is sufficient if I shew it to be a reasonable and possible construction, since the effect of such a construction would be to give a right of appeal to an innocent man who would otherwise have no such right. The appellant in this case only appeals against the finding of insanity. If that finding is quashed, the finding that he is guilty of the offence charged will remain undisturbed, and he submits himself to sentence for that offence.

Sir John Simon, A.-G. (with him *Tinsley Lindley* and *Branson*), for the Crown. The appellant has not been convicted on indictment, and therefore has no right of appeal under the Criminal Appeal Act.

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Before 1800, if a jury was of opinion that the prisoner had done the act charged, but had done it while he was insane, they could either return a verdict of not guilty, or could return a special verdict on which the judge entered a verdict of not guilty. See Foster's Crown Cases, p. 279, s. 1, and p. 282, where Bracton [136b, *De Corona*, C. 17, Vol. II., p. 398, Rolls ed.] is cited. The judges generally directed a general verdict of not guilty, because it was a moot point whether a finding of insanity entailed forfeiture or not. Cf. Pollock and Maitland's History of English Law, Vol. II., p. 479.

The Criminal Lunatics Act, 1800, recognised the existing condition of things, and confirmed the acquittal on the ground of insanity, but, as it was undesirable that such persons should be at large, the jury were required to return a special verdict, which enabled the judge to order the defendant to be detained. That statute was passed in consequence of Lord Erskine's defence of *Hadfield*, 27 St. Tr. 1281 (1800): see 1356. The verdict was: "We find the prisoner is not guilty; he being under the influence of insanity at the time the act was committed." Under that statute the issue of insanity could be tried even if the prosecution offer no evidence (s. 2).

The Trial of Lunatics Act, 1883, did not alter the fundamental position, that a prisoner is not guilty if he was insane at the time the act was committed. The statute avoids saying, "guilty of the crime," and s. 2 (4) provides that, "All provisions in any existing Act, or in any rules or orders made in pursuance of any existing Act, having reference to a person or persons acquitted on the ground of insanity, shall apply to a person or persons in respect of whom a special verdict is found under this Act." Further, the word "accused" is used in s. 2 (2) of the defendant after the verdict is found. The decision of the Court of Criminal Appeal in *Ireland* was wrong. A person against whom a special verdict had been found could plead *autrefois acquit* if charged with the same offence again. The Criminal Appeal Act, 1907, s. 5 (4), deals specifically and in terms with the reverse case, namely, where the appellant was convicted, but it appears to the Court that he was insane at the time the act was done; this supports my argument.

The Criminal Appeal Act only gives a right of appeal to a

person convicted on indictment, and a person of whom a special verdict has been found is not a person so convicted.

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McCurdy, in reply.

A. L. B. T.

LORD READING (*a*): My Lords, the appellant was indicted for wounding with intent to do bodily harm. The jury returned a special verdict in accordance with s. 2, sub-s. 1, of the Trial of Lunatics Act, 1883, that the prisoner was guilty of the act charged in the indictment as an offence, but was not responsible for his actions at the time, and thereupon the learned judge made an order for the safe custody of the appellant, under s. 2, sub-s. 2, of that statute.

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The appellant gave notice of appeal to the Court of Criminal Appeal against that part of the verdict which found that he was not responsible for his actions at the time of doing the act. The Court of Criminal Appeal held that they were bound to follow their decision in *Rex* v. *Machardy* [above], that they had no jurisdiction to hear and determine the appeal, and consequently dismissed it upon this ground. The appellant then applied to the Attorney-General for his certificate under s. 1, sub-s. 6, of the Criminal Appeal Act, 1907, who granted the application, and issued his certificate authorising the appellant to appeal to your Lordships' House.

The sole question for the decision of this House is whether an accused person who, by the special verdict, is found guilty of the act, but insane at the time, can appeal to the Court of Criminal Appeal against that part of the verdict which finds that he was insane at the time of doing the act. If there is any right of appeal it can only be that conferred by the Criminal Appeal Act, 1907. This Act was passed to establish a Court of Criminal Appeal, and to amend the law relating to appeals in criminal cases, and there is no right of appeal to the Court of Criminal Appeal, and no jurisdiction in that Court to hear an appeal unless the appellant can bring himself within that statute.

By s. 3 of the Criminal Appeal Act, 1907, "A person convicted

(*a*) The judgments are printed from a transcript of a shorthand report supplied by the courtesy of the Director of Public Prosecutions.

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on indictment may appeal under this Act to the Court of Criminal Appeal," and unless a person is "a person convicted on indictment." there is no right of appeal against the verdict or any part of it; therefore the question is whether by reason of the special verdict under the Trial of Lunatics Act, 1883, or any part of such verdict, the accused is "a person convicted on indictment."

In order fully to understand the effect of such a special verdict, it is well to examine the history of the law before the passing of the Trial of Lunatics Act, 1883.

In the earliest times proof of insanity when he committed the act charged did not entitle the accused to an acquittal, but to a special verdict carrying with it a right to a pardon. The same course was taken when the accused had killed a man by misadventure or in self-defence. See 1 Rot. Parl. 444; 3 Edw. 2 [cited by Stephen, above] (1310); and Fitzherbert's Grand Abridgment, *sub tit.* "Corone," pl. 351.

At a later period the jury in cases of insanity could either find a general verdict of not guilty, or a special verdict that the accused committed the act, but that at the time he was *non compos mentis*, and thereupon the Court gave judgment of acquittal. See 1 Hale's Pleas of the Crown, ed. of 1890, p. 28; and Sir Michael Foster's Crown Law, 3rd ed., Diss. II. C. IV., s. 1, p. 279. It is to be observed that in such cases the result of either a general or a special verdict was the acquittal of the accused, and in the words of the preamble of the subsequent statute of 1800, "it may be dangerous to permit persons so acquitted to go at large." In the public interest it became necessary to provide for the safe custody of the insane person notwithstanding the verdict of acquittal. Consequently the statute of 1800, 39 & 40 Geo. 3, c. 94, entitled, "An Act for the safe custody of Insane Persons charged with Offences," was passed. It was there enacted "that in all cases where it shall be given in evidence upon the trial of any person charged with treason, murder or felony, that such person was insane at the time of the commission of such offence, and such person shall be acquitted, the jury shall be required to find specially whether such person was insane at the time of the commission of such offence, and to declare whether such person was acquitted by them on account of such insanity; and if they shall find that such person was insane at the time of committing such offence the Court before whom such trial shall be had shall order such person to be

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kept in strict custody, in such place and in such manner as to the court shall seem fit, until His Majesty's pleasure shall be known."

The intention of the Legislature as manifested by this statute was to provide for the safe custody of persons who were found by the jury to be insane (a) at the time of committing the offence, or (b) upon arraignment, or (c) upon trial, or (d) upon being brought before any Court to be discharged for want of prosecution. In the last-mentioned case, it will be observed, upon examination of s. 2, that if even a person brought before the Court to be discharged for want of prosecution should appear to be insane the Court was empowered to empannel a jury to try his sanity, and if the jury found him insane, the Court could order his detention for safe custody during His Majesty's pleasure.

Under this statute the finding of the jury that the accused was insane at the time of committing the offence was not a conviction of any offence, but was an acquittal on account of insanity empowering the Court to order the safe custody of the accused during His Majesty's pleasure. The alteration in the law made with reference to a person insane at the time of committing the offence charged against him was that, although he was acquitted of the crime, he was detained as a lunatic. As Lord Denman C. J. said in *Rex* v. *Oxford*, 9 C. & P. 550, "the statute must mean that the jury are to find that that act has been done by the prisoner which fixes him as a criminal, unless he is a lunatic," implying that if he is a lunatic he is not a criminal, and is not convicted of any offence.

The last stage was the Trial of Lunatics Act, 1883, 46 & 47 Vict. c. 38, which is the statute now applicable. It made no substantial difference in the administration of the law, except that it enacted that where upon evidence the jury are satisfied that the accused did the act charged, but was insane so as not to be responsible according to law for his actions at the time he did the act, they must return "a special verdict" to that effect. That is not a verdict that the accused was guilty of the offence charged, but that he was guilty of the act charged as an offence. In other words, this verdict means that, upon the facts proved, the jury would have found him guilty of the offence had it not been established to their satisfaction that he was at the time not responsible for his actions, and therefore could not have acted with

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a "felonious" or "malicious" mind, which is an essential element of the crime charged against him.

The indictment of the appellant was for "feloniously" and "maliciously" wounding Lilian Ann Felstead, with intent to do some grievous bodily harm. It is obvious that if he was insane at the time of committing the act, he could not have had a *mens rea*, and his state of mind could not then have been that which is involved in the use of the term "feloniously" or "maliciously" for *crimen non contrahitur, nisi voluntas nocendi intercedat*. It was further argued that as the Trial of Lunatics Act, 1883, provided under s. 2, that where such a special verdict is found the accused should be kept in custody as a criminal lunatic, the Legislature must have intended the special verdict to operate as a conviction of a crime. In my judgment this contention is not well founded. By the use of the term "criminal lunatic" the Legislature meant by a compendious reference to bring into operation the powers given under the Act to make better provision for the custody and care of criminal lunatics, of 1860 (23 & 24 Vict. c. 75, and later statutes), which provided for detention in certain asylums, and under certain conditions, both of persons found insane and acquitted under the afore-mentioned Act of 1800, and of convicted persons who became insane during confinement in prison.

It was also contended that, as by s. 20 of the Criminal Appeal Act, 1907, writs of error and other modes of bringing a verdict and judgment under review had been abolished, the Legislature must have intended to give a right of appeal to the Court of Criminal Appeal whenever such a special verdict was found. It must, however, be borne in mind that your Lordships are deciding the proper interpretation to be placed upon the words of the statute, and cannot extend the right of appeal to those who, in your Lordships' opinion, are not persons "convicted on indictment."

My Lords, I have for these reasons come to the conclusion that the appellant is not a "person convicted on indictment." By the verdict of the jury he has been acquitted of the crime, and the order for his detention for safe custody is consequent upon the finding of insanity, and is not for a fixed period, but during His Majesty's pleasure.

The effect of this conclusion is to affirm the decision of the

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Court of Criminal Appeal that they had no jurisdiction to hear and determine the appeal of the appellant. That Court arrived at this decision because of the judgment in *Rex* v. *Machardy*, which affirmed *Rex* v. *Ireland*, (1910) 1 K. B. p. 654. In this last-mentioned case the Court of Criminal Appeal held that when a special verdict under the Trial of Lunatics Act, 1883, was found in reference to the accused, he was "a person convicted on indictment," and therefore had a right of appeal under the Criminal Appeal Act, 1907. The Court was largely influenced to their conclusion by reason of the use of the word "guilty" in the special verdict. It is unfortunate that this word is there used, as it suggests the responsibility for a criminal act. If the requirement under the statute had been merely to find that the accused did the act instead of that he was guilty of the act, there could have been no room for doubt that such a verdict was not a conviction, but was an acquittal.

Rex v. *Machardy* was a decision of the majority of the Court (consisting of five judges) constituted to consider the case of *Rex* v. *Ireland*, and whether an appeal lay against such part of the special verdict as found the accused insane. The majority of the judges approved the decision of *Rex* v. *Ireland*, but held that an appeal could be brought only against the first part of the verdict, and that, as the second part was in aid and relief of the accused, he could not appeal against it. Thus, the Court divided the verdict into two parts, and held that no appeal lay against that part relating to insanity. The special verdict is, in my opinion, one and indivisible by reason of the statutory provision, and takes the place of the general verdict of "Not Guilty," and is a verdict of acquittal of the accused.

It is worthy of observation that if the appellant succeeded in his present contention, and established on the hearing of the appeal that the verdict as to insanity should be set aside, he would be entitled forthwith to be set at liberty, for the remaining part of the verdict could not justify the passing of any sentence upon him, as it does not find him guilty of having committed an offence, but only of having done the act charged.

My Lords, I am of opinion, for the reasons given, that this appeal should be dismissed.

LORD ATKINSON: My Lords, I concur in the judgment which

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has just been delivered by my noble and learned friend, and I have been requested by Lord Dunedin and Lord Parker to express on their behalf their concurrence also.

The LORD CHANCELLOR: My Lords, I also concur in the judgment of my noble and learned friend, Lord Reading, and Lord Moulton has asked me to intimate to your Lordships that he also concurs in the opinion that has been delivered.

Order of Court of Criminal Appeal confirmed and appeal dismissed.

Solicitor for the Appellant—*H. Wellington Taylor*.

IN THE HOUSE OF LORDS.

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THE DIRECTOR OF PUBLIC PROSECUTIONS (on behalf of His Majesty) ..... *Appellant*

and

CHRISTIE ..... *Respondent.*

Coram: The Lord Chancellor, the Earl of Halsbury, Lords Dunedin, Atkinson, Moulton, Parker, and Reading C. J.

It is a rule of law that an incriminating statement made in the presence and hearing of the defendant, even on an occasion which would reasonably be expected to call for some explanation from him, is not evidence against him on his trial of the facts therein stated, save in so far as he has accepted the statement.

But a mere denial by him of the truth of such a statement does not in law render that statement inadmissible against him. To this extent Norton (1910, 2 *K. B.* 496; 5 *Cr. Ap. R.* 65) *is overruled.*

In practice, however, there is a rule of prudence and discretion that such a statement should not be tendered until, in the opinion of the judge, there is a foundation for a reasonable inference by the jury that the defendant accepted it or part of it. If, notwithstanding this rule, such a statement has been given in evidence, the judge, if he thinks that it should have been withheld, should caution the jury concerning its true effect. In this respect the judgment in Norton *represents the correct practice.*

It is competent (Lord Moulton *doubting*) *to prove by other witnesses who were present that the prosecutor identified the accused shortly after the occurrence of the offence charged.*

Held, by the Lord Chancellor, Lords Dunedin *and* Reading C. J., *that such evidence ought to be confined to the mere fact of identification, and not to be allowed to contain a repetition of the details of the offence; by* Lords Atkinson *and* Parker, *that the details are admissible as amplification of the act of identification.*

Held (*by all the noble and learned lords mentioned*), *that such a statement is not corroboration of the prosecutor's testimony within s.* 30 (*a*) *of* 8 *Edw.* 7, *c.* 67, *the Children Act,* 1908, *and* (*by the same noble and learned lords except* Lord Moulton) *that in this case it was not admissible as part of* res gestæ.

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The principles of the laws of evidence are the same, whether applied at civil or criminal trials, but they are not enforced with the same rigidity against a person accused of a criminal offence as against a party to a civil action: per Lord Reading C. J.

Order of the Court of Criminal Appeal (9 *Cr. Ap. R.* 171) *affirmed.*

Appeal (*a*) from an Order of the Court of Criminal Appeal (reported 9 Cr. App. R. 169; 30 T. L. R. 41).

Sir John Simon, A.-G. (with him *Branson, Comyns Carr*, and *Purchase*), for the Crown. In this case I granted a certificate under the Criminal Appeal Act, 1907, s. 1 (6), because an important point of criminal law is involved, but if the appeal is successful it is not proposed to take any steps to get the respondent punished his conviction having been quashed by the Court of Criminal Appeal.

[The LORD CHANCELLOR: We do not intend to give an abstract opinion as was done in *McNaughten's Case*.]

The respondent was convicted, at the Middlesex Sessions, of an indecent assault upon a little boy. The boy's mother was called, and was asked a question about a statement made by the boy in the presence of the prisoner within a few minutes of the offence being committed. Objection was taken to the question by counsel for the defence, and the mother's examination was postponed and the boy himself called. He gave evidence, but not on oath; he was not asked any questions about the statement objected to; he merely testified to the actual assault, and identified the prisoner. The mother was then re-called, and again asked about the statement made by the boy; objection was again taken by Mr. Bryan to the evidence on the authority of *Norton*, (1910) 2 K. B. 496; 79 L. J. K. B. 756; 102 L. T. 926; 74 J. P. 375; 54 S. J. 602; 26 T. L. R. 550; 5 Cr. App. R. 65; but the Deputy-Chairman admitted the evidence, which was to the effect that the boy in her presence, and in that of a police-constable, went up to the prisoner

(*a*) The argument in this report has been revised by means of a transcript of a shorthand report of the case, from which the judgments have been printed, supplied by the courtesy of the Director of Public Prosecutions.

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and said, "That is the man, mum." The police-constable asked, "What man?" and the boy then went up to Christie and said, "That is the old man," and gave a description of the acts done by Christie, who answered, "I am innocent"; the police-constable gave similar evidence, and he agreed that the prisoner said, "I am innocent," as soon as he had an opportunity of speaking. The defence was an *alibi*. On appeal, the Court of Criminal Appeal held that the evidence was inadmissible on the authority of *Norton*, which decided that a statement made in the presence of the accused is not admissible in evidence if the answer given by the prisoner is a repudiation of the truth of that statement. My submission is that that decision, and consequently the decision in the present case also, were wrong.

[The LORD CHIEF JUSTICE: The question is, is *R.* v. *Norton* right?]

Our law on "hearsay" is not so scientific as the principles in some foreign countries, but perhaps some of them have not such a good working practical code.

The relevance and admissibility of the conversation cannot depend on the prisoner's answer.

My submission falls under three heads: with reference to (1) identification; (2) the prisoner's demeanour; (3) "recent complaint" as corroboration.

[The LORD CHIEF JUSTICE: That is "consistent conduct": *Lillyman's Case*.]

The evidence was admissible, first, on the question of identification. The defence set up from the earliest stages in the case was that the wrong man had been picked out, and the prisoner sought to prove an *alibi*. When a young child some weeks after the event identifies the prisoner in the dock as the man who assaulted him, it may well be said that his evidence is not very trustworthy; it is, therefore, a matter of great relevance to shew that he picked out the same man within five minutes of the assault. The appellant admits that he picked him out. It does not advance the matter so much for the boy to say he identified the prisoner before as for other witnesses to say so. Such an act of identification is

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always admissible in evidence, and a sharp distinction should not be drawn between things said and things done. It is true that the boy was not himself asked whether he identified the prisoner on that occasion, and I agree that it is proper and desirable that he should be asked this, but if the evidence of the mother and policeman was admissible it does not become inadmissible because the boy was not asked this question. The defence being mistaken identity, it is relevant and admissible to prove that immediately after the offence the child said in the hearing of the accused, "That is the man." It must not be forgotten that the child did identify at the trial.

[LORD MOULTON: I think the fact that this happened a few minutes after the crime may make it *res gestæ*.]

You can admit evidence of identification as part of the *res gestæ*.

[The EARL OF HALSBURY: The only importance of "recent complaint" is that it shews *bona fides* and accuracy of the complainant.]

Secondly, the evidence was admissible as bearing on the demeanour of the accused at the time. The relevance of the evidence cannot depend on the answer that was given by the prisoner, and if the statement was admissible if the prisoner said, "Yes, I am the man," it cannot become inadmissible because he denied it. It is proper for the prosecution to bring out all the facts, whether they tell for or against the prisoner. The prisoner had set up an *alibi*, and given an account of what he had been doing; it was therefore relevant to shew that when first charged with the offence he gave merely a blunt denial without any explanation. It may be that the meaning of previous decisions is that there should be a rule of "prudence and discretion."

[The LORD CHIEF JUSTICE: Judges have used those very words —*e.g.*, Buller J., in *Young*, 3 T. R. at 106 (1789), and Lefroy B., in *Mitchel*, 6 State Trials (N. S.), at 619.]

and that the judge can suggest that it would not be fair to give

the evidence where the prisoner's answer has been a denial; in such cases counsel always accept the judge's suggestion, but that is a different thing to a wooden rule—which, with respect, seems to be the case in some of the earlier decisions of the Court of Criminal Appeal—that in law the admissibility of a statement depends on the answer given to it. The practice in England for years has been to admit evidence that a police officer read over the charge to the prisoner, and that he gave such-and-such an answer. If he denies the charge the evidence is none the less admissible. I ask your Lordships to get rid of that "wooden rule."

[The EARL OF HALSBURY: *R.* v. *Norton* is, to my mind, absolutely unintelligible. In the first place, the only question reserved was whether that was misdirection—anything more unlike misdirection I never saw in my life.]

Lastly—of course, my "heads" overlap—the evidence was admissible as proof of consistency of conduct, and this, whether the statement was made in the presence of the prisoner or not. It does not corroborate the truth of the statement, but it does corroborate its genuineness—a principle often applied in children's and indecent cases.

[The LORD CHANCELLOR: Then your first and third propositions go to *res gestæ*, and your second to admissions.

LORD MOULTON: Excluding the cases where the statement is very near the crime, which I think are dealt with under the question of *res gestæ*, you could not give independent evidence on the head of consistency until after cross-examination to consistency.]

The odd thing about that is, that it has been laid down in the cases following *Lillyman* again and again, that you are not required to wait until the prosecutor has been cross-examined to tender the evidence of recent complaint and the like.

[LORD MOULTON: No.]

Not only so, but it is put on this ground that the prosecution is

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entitled in a proper case to open and anticipate not only the possibility of such a defence being set up by the prisoner, but the possibility of such an explanation occurring to the jury, that the jury are entitled to have their minds relieved of that anxiety by its being pointed out to them by the evidence of the prosecutor, "that is not this case."

[The LORD CHIEF JUSTICE: The question has arisen whether it was proper for prosecuting counsel to open it.]

It is not correct to say that hearsay is no evidence; the true proposition is that hearsay is no evidence of the truth of the thing heard. In cases of this nature the violence done to innocence and virtue is so serious that the state of mind and other results last longer; and what the individual says or does may be part of the *res gestæ;* it is like a bruise, and the complaint is part of the phenomena of the assault. The evidence is therefore admissible to shew that a statement made months afterwards is not an invention. In *Lillyman*, (1896) 2 Q. B. 167; 65 L. J. M. C. 195; 74 L. T. 730; 44 W. R. 654; 18 Cox C. C. 346; 60 J. P. 536: C. C. R.; it was decided that upon the trial of an indictment for rape, or other kindred offences against women or girls, the fact that a complaint was made by the prosecutrix shortly after the alleged occurrence, and the particulars of such complaint, may, so far as they relate to the charge against the prisoner, be given in evidence on the part of the prosecution, not as being evidence of the facts complained of, but as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness-box, and as negativing consent on her part. Attempts were made to extend this doctrine, but they were not successful, and it only applies to a certain class of case. Even where consent is no defence, as was the case here, a complaint is relevant to test the consistency of conduct of the prosecutrix.

[LORD MOULTON: It must really be part of the *res gestæ* to allow it to be proved by the prosecution.]

The LORD CHIEF JUSTICE: In *Rowland*, 62 J. P. 459 (1898), Hawkins J. said: "All that *Lillyman* decided was that the terms of a complaint were only admissible as evidence of a want of

consent by the prosecutrix, and not as evidence of the truth of the charge against the person named in the complaint."]

It it true that in *Smith*, 18 Cox C. C. 470; 61 J. P. 120 (1897), Hawkins J. formulated much the same proposition as was decided in *Norton*, but that was not a decision of the Court of Crown Cases Reserved.

[The LORD CHIEF JUSTICE: The decisions have not been consistent.]

The *Attorney-General* read several passages from *Smith*.

In *Wood*, 14 Cox C. C. 46 (1877), evidence of a complaint was admitted in a case of rape, although made an hour and a half after the alleged assault, and not in the presence of the prisoner; Bramwell L.J. said that he left it to the jury to judge of the value of such testimony. Although repetition of the story is not corroboration, the consistency of conduct shewn by a complaint is corroboration—a term often loosely used. (The *Attorney-General* cited Phillimore J.'s judgment in *Hedges*, 3 Cr. App. R. 262: 1909.) *Norton* needs the closest attention, as it is the case which the Court of Criminal Appeal followed in quashing this conviction, and I come here to have the decision in *Norton* considered. I do not think that the judgment in *Norton* dealt with the question of identification, although the point was taken in argument. The judgment in that case seems to say that if evidence is inadmissible on one ground it cannot be given although admissible on another ground. An accusation made face to face is evidence of the truth of the belief held by the accuser; and if there is any issue whether the prisoner's demeanour is genuine the evidence is relevant. If the accuser wrote a letter to the prisoner immediately after the crime accusing him of that crime, the letter would be admissible in evidence as proof of the genuineness of his belief; and in civil cases anything that is said in the presence of the other party is admissible if relevant. Pickford J., in his judgment in *Norton*, cited Taylor on Evidence, s. 814, but that passage only deals with admissions. (The *Attorney-General* read the judgment in *Norton's Case*.)

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[EARL HALSBURY: The proposition in *Norton* is obviously wrong; it requires no argument.

The LORD CHIEF JUSTICE: I cannot help thinking that what I have called a rule of prudence must have been in the minds of the judges who gave that decision.]

There is a good deal of older authority, but they cannot all be right, as they are not consistent.

In a case like the present, where the child is not sworn, corroboration is required by statute, and it may be said that the corroboration here is very faint, but the point was not taken on appeal.

Dickens, K.C.: There were two grounds of appeal, the wrongful admission of evidence and misdirection. The point of corroboration was taken by Mr. Bryan, under the second head, but he was stopped by the Court.

[The LORD CHIEF JUSTICE: The point was not argued, but it was raised and was not absent from the mind of the Court. It was not necessary to express an opinion upon it, as we felt bound by *Norton's Case*.]

I do not admit that there was no corroboration, the fact that the *alibi* set up by the prisoner was completely exploded did not depend on the boy's evidence, and that fact is corroboration; also prisoner was seen creeping away down a ditch and hiding. I invite the House to lay down some rule of law such as that statements made in the presence of the accused, although not evidence of the truth of the statements, may be admissible for other purposes, and do not become inadmissible because the answer is a denial. The House may perhaps go on to say that some such evidence may be so far from the heart of the case that it would not be prudent to press it. The responsibility for that must depend upon the counsel for the prosecution, and the matter depends on the relations that exist between judge and counsel.

[LORD ATKINSON: Will this formula satisfy you? When a relevant statement is made in the presence of the prisoner, in

circumstances reasonably calling for an answer from him, the statement is evidence against him of the facts stated so far as he admits them. Whether he admits them or not is a question for the jury, to be decided on all the evidence in the case, including the demeanour of the prisoner when the statement was made; and the denial by him of the truth of the statement at that time is not conclusive on the issue of fact, and does not render the statement inadmissible in evidence.]

Yes, I would accept that.

[The EARL OF HALSBURY: I must protest against the suggestion that any judge has the right to exclude evidence which is in law admissible, on the ground of prudence or discretion, and so on.]

The phrase "rule" of prudence and discretion which has been applied to this principle is not a correct expression; it is rather advice and suggestion which counsel in a proper case would follow.

Dickens, K.C. (with him *Bryan*), for the respondent. It is important to bear the facts of this case in mind. The conversation did not consist merely in pointing out the man, but in repeating all the details of the alleged offence. The mere fact of identification is admissible, but the evidence ought not to go into details. The danger is that, although the jury ought not to take it as adding to the truth of the facts, they do do so. Those who practise in criminal courts know that in such a case the prisoner starts gravely prejudiced, and therefore judges ought to exercise extreme care in admitting such evidence.

The first question is how far a matter of discretion can become crystallised into a rule of law. In rape it is part of the case for the Crown that the act was done against the will of the prosecutrix, and no judge would allow a conviction without corroboration of her evidence on the ground that from his own knowledge of the world, and his experience in such cases, corroboration is necessary. If the jury were not warned of this, and were merely asked if they believed the girl's story, the conviction could not stand. It began as a rule of prudence, and has crystallised into a rule of law. The necessity for corroboration of the evidence of accomplices is

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a still stronger instance. If the evidence is held admissible a zealous constable will confront the accused with the prosecutor, or with the statements of other accused persons so as to get evidence, even though the accusation is denied. A criminal trial should not take the course of an ordinary action between plaintiff and defendant. This is not a conversation between the parties; the Crown is a party, not the prosecutor. Nor was it a conversation at all, for the prisoner took no part in it except to deny the truth of the statement. It is reasonable that some one who was present should prove the act of identification, but this evidence goes far beyond that. If it is in the interests of the prisoner that the conversation should be given in evidence, it can be elicited by his own counsel. If it is not admissible on the ground of consistency of conduct, how does it help the prosecution? It does not add to the proof of the fact. It is suggested that it is part of the *res gestæ*, but that cannot be so; the identification may be, but not the fact that a statement is made of all the circumstances of the case. In *Horsford*, a case tried before Hawkins J., at Huntingdon Assizes, and referred to by him in *Rowland* (above), Hawkins J. held that the statement, "I have taken poison; H. sent it to me," was no part of the *res gestæ*, and admitted only the first part of it in evidence. In *Bedingfield*, 14 Cox C. C. 341 (1879), a statement was held not to be part of the *res gestæ* which was made immediately after the act had been completed.

Statements made by women and girls are only admitted for the purpose of proving non-consent; it goes back to the days when a woman raped had to raise a hue and cry, and had to make a statement of what had happened to some reputable person. To be admissible as part of the *res gestæ*, the statement must be a continuance of the act itself. In *Goddard*, 15 Cox C. C. 7 (1882), a statement made by a woman as to the cause of the injuries from which she died very shortly afterwards, was admitted, not as part of the *res gestæ*, but as a dying declaration. In *Nicholas*, 2 Car. & K. 246 (1846), where the alleged offence was committed on a girl who was too young to give evidence on oath, evidence was not received of what the child stated to her mother shortly after the alleged offence took place. In *Foster*, 6 Car. & P. 325 (1834), which was a case of manslaughter, evidence of a statement by the deceased how the accident happened was admitted, Park J. referring to *Aveson* v. *Lord Kinnaird*, 6 East, 188; 2 Smith, 286;

8 R. R. 455 (1805), where Lord Ellenborough said that, if a wife left her husband's house, declaring at the time that she did so from immediate terror of personal violence, he should admit that declaration as evidence; but not if it were a collateral declaration of some matter which happened at another time. See also *Wainwright*, 13 Cox C. C. 171 (1875), and *Pook*, 13 Cox C. C. 172, n. (1871), where statements made before the crime were held not to be part of the *res gestæ*.

If the statement was not admissible as a conversation between plaintiff and defendant, nor on the question of identity, nor as part of the *res gestæ*, it can only become evidence if by word or manner it is admitted by the prisoner; therefore the decision in *Norton* was right. If that decision rests on grounds of prudence and discretion it would be very deplorable if the judgment of the House was to exclude that act of discretion on the part of the presiding judge at a criminal trial. It would be valuable if the House could give some indication on the question of discretion.

On the question of consistency of conduct the evidence is only admissible to rebut a defence set up, but cannot be given in the first instance. The doctrine laid down in *Lillyman* only applies to offences against women and girls, and until *Osborne*, (1905) 1 K. B. 551; 74 L. J. K. B. 311;. 92 L. T. 393; 69 J. P. 189; 21 T. L. R. 288; 53 W. R. 494: C. C. R.; not even in those cases unless consent was in question.

The Attorney-General has not argued the point, and I understand that the House does not require me to argue it.

Apart from the questions argued the conviction was bad on the ground of misdirection. The boy gave unsworn testimony, and by the Children Act, 1908, s. 30 (a), 8 Edw. 7, c. 67, such evidence requires corroboration "by some other material evidence in support thereof implicating the accused." The Deputy-Chairman never told the jury that corroboration was necessary before they could convict the prisoner, and said the case depended on what the child said. He also told the jury, "You have the child's story told by himself before you to-day, and the same story told, as it were, in answer to the policeman's questions in the presence of the defendant on the morning of the occurrence; and you will please treat that evidence, and treat the evidence of the mother in so far as it relates to the child's statement of identification, as being corroborative evidence of what you have heard." That is such a serious misdirection that it would be impossible to hold that no injustice

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has been done; the jury must have taken the statement as corroboration of the facts.

Branson, in reply.

The House took time for consideration.

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The LORD CHANCELLOR: My Lords, I have had the advantage of considering the opinions which three of your Lordships are about to express. For the special reasons given by my noble and learned friends, Lord Atkinson and Lord Reading, I agree that the judgment of the Court of Criminal Appeal quashing the conviction should be affirmed. But the important question is not the minor one whether the particular direction given by the Deputy-Chairman to the jury was open to exception on special grounds, but whether the general law laid down in the case as to the statement of the boy alleged to have been indecently assaulted was rightly laid down. In the opinions about to be delivered by Lord Atkinson, Lord Moulton, and Lord Reading the true view of the law appears to me to be expressed. The only point on which I desire to guard myself is the admissibility of the statement in question as evidence of identification. For the boy gave evidence at the trial, and if his evidence was required for the identification of the prisoner, that evidence ought, in my opinion, to have been his direct evidence in the witness-box, and not evidence of what he said elsewhere. On this point I share the doubt which I understand is to be expressed by my noble and learned friend, Lord Moulton. Had the boy after he had identified the accused in the dock been asked if he had identified the accused in the field as the man who assaulted him, and answered affirmatively, then that fact might also have been proved by the policeman and the mother who saw the identification. Its relevancy is to shew that the boy was able to identify at the time and to exclude the idea that the identification of the prisoner in the dock was an afterthought or a mistake. But beyond the mere fact of such identification the examination ought not to have proceeded. Subject to this observation I concur in the judgments about to be delivered.

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LORD ATKINSON: My Lords, this is an appeal from an order of the Court of Criminal Appeal, dated the 27th of October, 1913, whereby the conviction of the appellant, under the sixty-second section of the Offences Against the Person Act, 1861, for indecently assaulting a boy named Frederick Butcher, of about five years of age, was quashed, and a verdict and judgment of acquittal directed to be entered upon the indictment upon which the appellant had been convicted.

The accused was then discharged from custody. The Attorney-General stated that there was no intention of re-arresting him, whatever the result of this appeal might be.

The questions of law arising on the appeal are:—(1) Whether a certain statement made by this boy Butcher in the presence and hearing of the accused and of a police-constable was properly admitted in evidence; and (2) whether the child having been permitted under the powers of the thirtieth section of the Children Act, 1908, 8 Edw. 7, c. 67, by the Deputy-Chairman, before whom the case was tried, to give evidence without being sworn, this judge had misdirected the jury in telling them that the statement so made by the boy in presence of the accused was, within the meaning of that section, material evidence implicating the accused, in corroboration of the boy's testimony given at the trial.

The little boy when examined as a witness proved what had been done to him, and identified the prisoner as the person who had done it, but was not asked any questions, and did not give any evidence in reference to any previous identification of the accused by him, nor refer to any statement previously made by him in the presence of the accused. He was not cross-examined upon his evidence of identification given at the trial.

The boy's mother, Mrs. Charlotte Butcher, and Constable William Crooks were examined. The latter proved that he was stationed at Edmonton, and that having received certain information he went to a field off Winchester Road, saw a number of people, including the prisoner, Mrs. Butcher, and her son standing there; that she made a complaint to him (the constable) that a man had assaulted her son, that the boy then said to his mother, "That is the man, mum"; Crooks then asked the boy which was the man, whereupon the boy went up to the accused, touched him upon the sleeve of his coat, and said, "That is the man"; that he (the constable) then asked the boy, "What did he do to you?"

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In reply to which question the boy made a statement giving full particulars of the offence charged, and the accused replied, " I am innocent."

The Attorney-General contended that the entire statement of the boy was admissible on each of four separate grounds:—(1) As part of the act of identification, or as explanatory of it; (2) as a statement made in the presence of the prisoner in circumstances calling for some denial or explanation from him, the truth of which he admitted by his conduct and demeanour; (3) as proof of the consistency of the boy's conduct before he was examined, with the testimony given by him at the trial; (4) as part of the *res gestæ*.

Your Lordships intimated, during the course of the argument, that you would not consider this third point. It is, therefore, unnecessary to allude to it further.

Of course, it will suffice for the Attorney-General's purpose if the statement be admissible on any of these grounds. It is, I think, clear that the principle laid down in *Regina* v. *Lillyman* (1896) 2 Q. B. 167, and in those cases which followed it, has no application to the present case. In these cases it was decided that in rape and other sexual crimes committed against women, the statement of the prosecutrix made in the absence of the accused in the form of a complaint, immediately or soon after the commission of the offence, is admissible in evidence, even though the full details of the crime be stated. In that case consent was immaterial on the charge in the first count of the indictment, upon which alone the prisoner was convicted, though it was material on some of the other counts. It is admitted that such a statement is no evidence against the accused of the facts stated. There is some conflict between the authorities as to the particular grounds upon which such statements are admitted, but I think the general result of the cases is that the complaint is only admissible to negative consent. It is to be remembered that statements admitted under heads 1 and 4 are not, as against the accused, affirmative evidence of the facts stated, but only of the knowledge of, or the belief in, those facts by the person who makes the statement, or of his intention in respect of them. They must, of course, in order to be admissible, be relevant to the issue, the guilt of the accused of the offence charged against him.

As to the first point, it cannot, I think, be open to doubt that if the boy had said nothing more, as he touched the sleeve of the coat

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of the accused, than "That is the man," the statement was so closely connected with the act which it accompanied, expressing, indeed, as it did, in words little if anything more than would have been implied by the gesture *simpliciter,* it should have been admitted as part of the very act of identification itself. It is on the admissibility of the further statement made in answer to the question of the constable that the controversy arises. On the whole I am of opinion, though not without some doubt, that this statement only amplifies what is implied by the words "That is the man," *plus* the act of touching him.

A charge had been made against the accused for the offence committed on the boy. The words, "That is the man," must mean that is the man who has done to me the thing of which he is accused. To give the details of the charge is merely to expand and express in words what is implied under the circumstances in the act of identification. I think, therefore, that the entire statement was admissible on these grounds, even although the boy was not asked at the trial anything about the former identification. The boy had, on his evidence at the trial, distinctly identified the accused. If on another occasion he had, in the presence of others, identified him, then the evidence of these eye-witnesses is quite as much primary evidence of what acts took place in their presence as would be the boy's evidence of what he did, and what expressions accompanied his act. It would, I think, have been more regular and proper to have examined the boy himself as to what he did on the first occasion, but the omission to do so, while the by-standers were examined on the point, does not, I think, violate the rule that the best evidence must be given. His evidence of what he did was no better, in that sense, than was their evidence of what they saw him do.

As to the second ground, the rule of law undoubtedly is that a statement made in the presence of an accused person, even upon an occasion which should be expected reasonably to call for some explanation or denial from him, is not evidence against him of the facts stated, save so far as he accepts the statement, so as to make it, in effect, his own. If he accepts the statement in part only, then to that extent alone does it become his statement. He may accept the statement by word or conduct, action or demeanour, and it is the function of the jury which tries the case to determine whether his words, action, conduct, or demeanour at the time when a statement is made amounts to an acceptance of it in whole or in

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part. It by no means follows, I think, that a mere denial by the accused of the facts mentioned in the statement necessarily renders the statement inadmissible, because he may deny the statement in such a manner, and under such circumstances as may lead a jury to disbelieve him, and constitute evidence from which an acknowledgment may be inferred by them.

Of course, if at the end of the case the presiding judge should be of opinion that no evidence has been given upon which the jury could reasonably find that the accused had accepted the statement so as to make it in whole or in part his own, he should instruct the jury to disregard the statement entirely. It is said that, despite this direction, grave injustice might be done to the accused, inasmuch as the jury, having once heard the statement, could not, or would not, rid their mind of it. It is, therefore, in the application of the rule that the difficulty arises. The question then is this: Is it to be taken as a rule of law that such a statement is not to be admitted in evidence until a foundation has been laid for its admission by proof of facts from which, in the opinion of the presiding judge, a jury might reasonably draw the inference that the accused had so accepted the statement as to make it in whole or in part his own; or is it to be laid down that the prosecutor is entitled to give the statement in evidence in the first instance, leaving it to the presiding judge, in case no such evidence as the above-mentioned should be ultimately produced, to tell the jury to disregard the statement altogether?

In my view, the former is not a rule of law, but it is, I think, a rule which, in the interest of justice, it would be most prudent and proper to follow as a rule of practice.

The course suggested by Mr. Justice Pickford in *Rex* v. *Norton*, (1910) 2 K. B. 496, at p. 500; 5 Cr. App. R. at 74, 75, where workable, would be quite unobjectionable in itself as a rule of practice, and equally effective for the protection of the accused.

The course pursued when accomplices are examined as witnesses is very analogous to that suggested. It is not a rule of law that the evidence of an accomplice must be corroborated in order to render a conviction on his evidence valid (*Rex* v. *Atwood*, 1 Leach, 464 (1787); *Re Meunier*, (1894) 2 Q. B. 415); but it is a general rule of practice that judges should advise juries not to convict on the evidence of an accomplice unless it be corroborated, and this is a matter entirely for the discretion of the judge before whom a case is tried. *Regina* v. *Stubbs*, Dears. C. C. 555 (1855); *Queen*

v. *Boyes*, 1 B. & S. 311; 30 L. J. Q. B. 301; 9 Cox C. C. 32; Q. B. (1861).

Again, if two persons are jointly indicted and tried together, the statements made by each are generally only evidence against him who makes them. In certain circumstances, they may be evidence against both; but, if they be only evidence against him who makes them, injustice to the other accused is guarded against by the presiding judge telling the jury that this is so. There is no sufficient reason, I think, to suppose that injustice to the accused could not be effectually guarded against by the judge instructing the jury that they should discard from their minds a statement not found to have been accepted by the accused as his own.

As to the fourth ground, the boy's statement was so separated by time and circumstance from the actual commission of the crime that it was not, I think, admissible as part of the *res gestæ*. In *Thompson and Wife* v. *Trevanion*, Skinner's Reports, p. 402 (1693), tried before Chief Justice Holt, sitting at *Nisi Prius*, it was held that what a woman said immediately on a hurt being received by her, and before she had time to contrive anything for her own advantage, might be given in evidence. The rule is here stated to rest on the absence of time or opportunity for concoction. In *Regina* v. *Bedingfield*, 14 Cox C. C. 341 (1879), a woman rushed out of a room with her throat cut almost through, made a statement to some women she met, and expired in a very short time. Her husband was found in this room with his throat cut also. The question at issue was murder or suicide. Chief Justice Cockburn said: "The woman's statement was not admissible, for it was not part of anything done or something said while something was being done, but something said after something done. It is not as if, while being in the room and the act was being done, she had said something which was overheard." In other cases, such as *Rex* v. *Foster*, 6 C. & P. 325 (1834); *Rex* v. *Lunny*, 6 Cox C. C. 477 (1854), the rule was applied with less strictness. I have found no authority, however, which would justify the admission of any part of the boy's statement as part of the *res gestæ*.

Even, however, if the boy's statement was admissible in evidence if properly dealt with, I think the verdict should be quashed. The Deputy-Chairman never explained properly to the jury that it is what the accused accepts as his own of the statement made in his presence that is evidence against him, not the statement itself.

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Again, he treated the evidence of the mother of the boy and the constable, as to what the boy said and did on the occasion of the identification, as corroboration of his testimony at the trial, within the meaning of the thirtieth section of the Children Act of 1908. This is of course, wholly erroneous. If the boy himself had been examined either in chief or on cross-examination, and had detailed what took place at the identification, this portion of his evidence could not be treated as corroboration of the other portion proving the charge. He could not be his own corroborator. It can make no possible difference when others tell what he did and said on that occasion. Their evidence is no more "material corroborative evidence in support of his evidence at the trial implicating the accused" than his own would be.

The appeal, so far as it is directed to reverse the decision appealed from, should, I think, be dismissed, although the Crown have succeeded on the point as to the admissibility in evidence of the statement.

My Lords, I have been requested by my noble and learned friend, Lord Parker, to express his concurrence in this judgment.

LORD MOULTON'S judgment was read by LORD READING: My Lords, the evidence admitted in this case, the admissibility of which is the question raised by the appeal, consists of the statements of more than one witness as to one and the same event, namely, that which passed on the occasion when the little boy on whom the assault is alleged to have been committed came into the presence of the prisoner almost immediately after that assault is alleged to have taken place. For the purpose of considering the point, it will suffice to take the evidence of one of these witnesses, inasmuch as the same point is involved in each case. I will, therefore, select the evidence given by the boy's mother.

She says that she took the boy back to the field where the prisoner was standing, and that he said in the prisoner's presence, pointing him out, "That is the man." The constable then asked, "Which man?" and the boy went up and touched the prisoner and said "That is the old man who did so-and-so" (giving particulars of the assault). The prisoner said, "I am innocent."

The admission of this evidence has been defended on three grounds: (1) That it was evidence of identification of the prisoner by the boy; (2) that it was a statement made in the presence of

the prisoner, coupled with evidence of his behaviour on hearing the statement; and (3) that it was relevant to the issue of "consistent complaint," and therefore admissible in the case of an offence such as an indecent assault committed on a small child. It has also been claimed that it may be considered as part of the *res gestæ*, but I shall not discuss it from that point of view.

My Lords, I do not propose to deal with the third ground, because it is not necessary to do so for the purpose of deciding this appeal, and it raises very difficult questions which would be better decided in some case where the admission of the evidence turns directly on the point. I shall, therefore, confine myself to the first and second of the above grounds. They do not depend in any way on the youth of the person making the statement, and the issue is therefore free from the complications which might arise from the fact that he was a child of tender years.

Speaking for myself, I have great difficulty in seeing how this evidence is admissible on the ground that it is part of the evidence of identification. To prove identification of the prisoner by a person, who is, I shall assume, an adult, it is necessary to call that person as a witness. Identification is an act of the mind, and the primary evidence of what was passing in the mind of a man is his own testimony, where it can be obtained. It would be very dangerous to allow evidence to be given of a man's words and actions, in order to shew by this extrinsic evidence that he identified the prisoner, if he was capable of being called as a witness, and was not called to prove by direct evidence that he had thus identified him. Such a mode of proving identification would, in my opinion, be to use secondary evidence where primary evidence was obtainable, and this is contrary to the spirit of the English rules of evidence.

There remains the second ground, namely, that it is evidence of a statement made in the presence of the accused, and of his behaviour on that occasion. Now, in a civil action evidence may always be given of any statement or communication made to the opposite party, provided it is relevant to the issues. The same is true of any act or behaviour of the party. The sole limitation is that the matter thus given in evidence must be relevant. I am of opinion that, as a strict matter of law, there is no difference in this respect between the rules of evidence in our civil and in our criminal procedure. But there is a great difference in the practice.

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The law is so much on its guard against the accused being prejudiced by evidence which, though admissible, would probably have a prejudicial influence on the minds of the jury, which would be out of proportion to its true evidential value, that there has grown up a practice of a very salutary nature, under which the judge intimates to the counsel for the prosecution that he should not press for the admission of evidence which would be open to this objection; and such an intimation from the tribunal trying the case is usually sufficient to prevent the evidence being pressed in all cases where the scruples of the tribunal in this respect are reasonable. Under the influence of this practice, which is based on an anxiety to secure for everyone a fair trial, there has grown up a custom of not admitting certain kinds of evidence which is so constantly followed that it almost amounts to a rule of procedure. It is alleged on the part of the respondents that an instance of this is the case of the accused being charged with the crime and denying it, or not admitting it.

It is common ground that, if on such an occasion he admits it, evidence can be given of the admission and of what passed on the occasion when it was made. It seems quite illogical that it should be admissible to prove that the accused was charged with the crime if his answer thereto was an admission, while it is not admissible to prove it when his answer has been a denial of the crime; and I cannot agree that the admissibility or non-admissibility is decided as a matter of law by any such artificial rule. Going back to first principles as enunciated above, the deciding question is whether the evidence of the whole occurrence is relevant or not. If the prisoner admits the charge, the evidence is obviously relevant. If he denies it, it may or may not be relevant. For instance, if he is charged with a violent assault and denies that he committed it, that fact might be distinctly relevant if at the trial his defence was that he did commit the act, but that it was in self-defence. The evidential value of the occurrence depends entirely on the behaviour of the prisoner; for the fact that some one makes a statement to him subsequently to the commission of the crime cannot in itself have any value as evidence for or against him. The only evidence for or against him is his behaviour in response to the charge; but I can see no justification for laying down as a rule of law that any particular form of response, whether of a positive or negative character, is such that it cannot in some cir-

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cumstances have any evidential value. I am, therefore, of opinion that there is no rule of law that evidence cannot be given of the accused being charged with the offence, and of his behaviour on hearing such charge where that behaviour amounts to a denial of his guilt. This is said to have been laid down as a rule of law in *Rex* v. *Norton*, and to have been followed by the Courts since that decision. If this be so, I think that the decision was wrong; but I am by no means convinced that it was intended in that case to lay down any such rule of law.

But while I am of opinion that there is no such rule of law, I am of opinion that the evidential value of the behaviour of the accused where he denies the charge is very small either for or against him; whereas the effect on the minds of the jury of his being publicly or repeatedly charged to his face with the crime might seriously prejudice the fairness of his trial. In my opinion, therefore, a judge would in most cases be acting in accordance with the best traditions of our criminal procedure if he exercised the influence which he rightly possesses over the conduct of a prosecution in order to prevent such evidence being given in cases where it would have very little or no evidential value. Subject to these words of caution, I am of opinion that this appeal should be allowed on the ground stated above, because we have to decide upon the admissibility as a matter of law, and so regarded, I have no doubt that the evidence in question was rightly admitted.

I am, however, of opinion that the direction of the Deputy-Chairman as to corroboration was wrong, and therefore, notwithstanding my opinion on the admissibility of the evidence, the conviction cannot stand.

LORD READING: My Lords, this is an appeal by the Director of Public Prosecutions from an order of the Court of Criminal Appeal whereby the conviction of Albert Christie for an indecent assault upon a boy aged five years was quashed upon the ground of misreception of evidence at the trial.

The Attorney-General informed your Lordships in his address that, should this appeal be allowed and the conviction be restored, it was not intended to take any further steps against Christie in respect of the sentence passed upon him.

The appeal is brought under the certificate of the Attorney-General (Criminal Appeal Act, 1907, s. 1, sub-s. (6)), to obtain

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your Lordships' opinion as to the admissibility of certain evidence given in this case, which the Court of Criminal Appeal held to be inadmissible by reason of the decision of that Court in *The King* v. *Norton*, L. R. (1910) 2 K. B. D. p. 496.

At the trial, the mother of the boy stated in evidence that about 10 a.m he left her, and that she next saw him about 10.30 a.m. After describing his then condition, she stated that she took him across the fields, and there saw a man with whom she had a conversation and Christie was then fetched. She was asked whether the boy said anything in the presence and hearing of Christie; she answered in the affirmative, and objection was raised to the admission in evidence of the conversation. Her evidence was then interrupted, and the boy was called. He related the story of the assault, and when asked by counsel if he could see the man in Court who committed it, he pointed to Christie. Counsel for the defence did not cross-examine.

The evidence of the mother was then resumed, and she was again asked whether the boy said anything in Christie's presence. Counsel for the defence again objected, and argued, upon the authority of the Court of Criminal Appeal in *The King* v. *Norton*, that the evidence was not admissible, inasmuch as Christie had denied the statement made in his presence. The Deputy-Chairman was aware from the depositions of the nature of the statement and of Christie's answer to it. The evidence was admitted. The mother then stated that as she and the boy were going towards Christie, the boy said, "That is the man, mum." Crooks, a police-constable, was standing close to Christie, and asked, "What man?" The boy went up close to Christie and said, "That is the old man, mum," and proceeded to give a description of the acts done by Christie, who replied. "I am innocent." Police-constable Crooks, when called, said that the boy, in answer to the question, "Which is the man?" went up to Christie, touched him on the sleeve, and said, "That is the man." The police-constable asked, "What did he do to you?" and the boy then gave an account of the various acts done by Christie, who answered, "I am innocent; I have been asleep in the fields since 8 o'clock last night." The only cross-examination was to elicit a repetition of the statement by Christie: "I am innocent." Christie was convicted, and appealed to the Court of Criminal Appeal. The Court was of opinion that it was bound

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to follow *The King* v. *Norton*, and that the admission of the evidence was in contravention of the rule there formulated. It held that the evidence was inadmissible, and quashed the conviction.

The Attorney-General submitted that this evidence was admissible, first, because, it was part of the act of identification by the boy; secondly, because it was a statement made in the hearing and presence of Christie, which had a bearing upon his conduct and demeanour at the time of hearing it; thirdly, because it proved that the boy's conduct, after the offence was committed and before he gave evidence, was consistent with the statements made by him at the trial; and fourthly, because it was part of the *res gestæ*.

During the argument your Lordships intimated that it was not convenient on this appeal to consider the third ground, and there was no further discussion upon it.

As to the first ground. No objection was raised by Mr. Dickens, for the respondent, to the admission of the first part of the statement, namely, "That is the man." It implied that Christie was the man designated by the boy as the person who had committed the offence, and meant little, if anything, more than the act of touching the sleeve of Christie or pointing to him. The importance is as to the admission of the additional words, describing the various acts done by Christie. These were not necessary to complete the identification or to explain it. There was no dispute that in the presence of his mother and the police-constable the boy designated Christie as the man who had committed the offence. According to the constable's evidence the additional statement was made in answer to his question to the boy, "What did he do to you?" At the trial, and before the statement was admitted, the boy identified Christie in Court, and was not cross-examined. The additional statement was not required by the prosecution for the purpose of proving the act of identification by the boy. The statement cannot, in my judgment, be admitted as evidence of the state of the boy's mind when in the act of identifying Christie, as that would amount to allowing another person to give in evidence the boy's state of mind when he was not asked, and had not said anything about it in his statement to the Court.

If the prosecution required the evidence, as part of the act of identification, it should have been given by the boy before the

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prosecution closed their case. In my judgment, it would be a dangerous extension of the law regulating the admissibility of evidence if your Lordships were to allow proof of statements made, narrating or describing the events constituting the offence, on the ground that they form part of or explain the act of identification, more particularly when such evidence is not necessary to prove the act, and is not given by the person who made the statement. I have found no case in which any such statement has been admitted.

As to the second ground. A statement made in the presence of one of the parties to a civil action may be given in evidence against him if it is relevant to any of the matters in issue. And equally such a statement made in the presence of the accused may be given in evidence against him at his trial.

The principles of the laws of evidence are the same whether applied at civil or criminal trials, but they are not enforced with the same rigidity against a person accused of a criminal offence as against a party to a civil action. There are exceptions to the law regulating the admissibility of evidence which apply only to criminal trials, and which have acquired their force by the constant and invariable practice of judges when presiding at criminal trials. They are rules of prudence and discretion, and have become so integral a part of the administration of the criminal law as almost to have acquired the full force of law. A familiar instance of such a practice is to be found in the direction of judges to juries strongly warning them not to act upon the evidence of an accomplice unless it is corroborated. See *Reg.* v. *Stubbs*, Dearsley's C. C. 555 (1855); *Reg.* v. *Boyes*, 1 B. & S. 311 (1861); *In re Meunier*, (1894) 2 Q. B. 418; *Rex* v. *Wilson*, 6 Cr. App. R. 125 (1911); and *Rex* v. *Blatherwick*, 6 Cr. App. R. 281 (1911). Such a practice has also long existed in reference to the admissibility in evidence of such a statement as that now under consideration. See *Reg.* v. *Welsh* (1862), 3 F. & F. 275; and *Reg.* v. *Smith*, 18 Cox C. C. 470 (1897), *per* Mr. Justice Hawkins, which the Court of Criminal Appeal refused to follow as a rule of law in *Rex* v. *Thompson*, (1910) 1 K. B. 640; 4 Cr. App. R. 45.

Such practice has found its place in the administration of the criminal law because judges are aware from their experience that in order to ensure a fair trial for the accused, and to prevent the

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operation of indirect, but not the less serious, prejudice to his interests, it is desirable in certain circumstances to relax the strict application of the law of evidence. Nowadays, it is the constant practice for the judge who presides at the trial to indicate his opinion to counsel for the prosecution that evidence which, although admissible in law, has little value in its direct bearing upon the case, and indirectly might operate seriously to the prejudice of the accused, should not be given against him; and, speaking generally, counsel accepts the suggestion, and does not press for the admission of the evidence unless he has good reason for it.

That there is danger that the accused may be indirectly prejudiced by the admission of such a statement as in this case is manifest; for, however carefully the judge may direct the jury, it is often difficult for them to exclude it altogether from their minds as evidence of the facts contained in the statement.

In general, such evidence can have little or no value in its direct bearing on the case unless the accused, upon hearing the statement, by conduct and demeanour, or by the answer made by him, or in certain circumstances by the refraining from an answer, acknowledged the truth of the statement either in whole or in part, or did or said something from which the jury could infer such an acknowledgment. For if he acknowledged its truth, he accepted it as his own statement of the facts. If the accused denied the truth of the statement when it was made, and there was nothing in his conduct and demeanour from which the jury, notwithstanding his denial, could infer that he acknowledged its truth in whole or in part, the practice of the judges has been to exclude it altogether. In *Rex* v. *Norton*, 5 Cr. App. R. 75, Mr. Justice Pickford, in delivering the judgment of the Court of Criminal Appeal, said, at p. 500: "If there be no such evidence [that is, of acknowledgment by the accused], then the contents of the statement should be excluded; if there be such evidence, then they should be admitted." If it was intended to lay down rules of law to be applied whenever such a statement is tendered for admission, I think the judgment goes too far; they are valuable rules for the guidance of those presiding at trials of criminal cases when considering how the discretion of the Court with regard to the admission of such evidence should be exercised; but it must not be assumed that the judgment in *Rex* v. *Norton* exhausts all the circumstances which

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may have to be taken into consideration by the Court when exercising its judicial discretion.

It might well be that the prosecution wished to give evidence of such a statement in order to prove the conduct and demeanour of the accused when hearing the statement as a relevant fact in the particular case, notwithstanding that it did not amount either to an acknowledgment, or some evidence of an acknowledgment, of any part of the truth of the statement. I think it impossible to lay down any general rule to be applied to all such cases, save the principle of strict law to which I have referred.

Upon the whole, therefore, I come to the conclusion that the rules formulated in *The King* v. *Norton*, and followed in this and other cases, must be restricted in their application as above indicated, and cannot be regarded as strict rules of law regulating the admissibility of such evidence.

I think, therefore, that this statement was in law admissible as evidence against Christie.

As to the fourth point. The statement under review formed no part of the incidents constituting the offence. It was not made whilst the offence was being committed or immediately thereafter. It took place after Christie had left the boy, and the mother had found him and taken him across the fields, and had spoken to another man. In my view, it was not so immediately connected with the act of assault as to form part of the *res gestæ*. In the words of Chief Justice Cockburn, in *Reg.* v. *Bedingfeld*, 14 Cox C. C. (1879) p. 342: "It was not part of anything done, or something said while something was being done, but something said after something done. It was not as if, while being in the room, and while the act was being done, she had said something which was heard."

This ruling was given at the trial of an indictment for the murder of a woman when it was sought by the prosecution to give in evidence, as part of the *res gestæ*, a statement made by the deceased. It appeared that she, with her throat cut, came suddenly out of a house, and, pointing backwards to the house, made a statement to two women whom she employed. She had left the prisoner in the house, and his throat was also cut. She succumbed to the injuries within a few minutes after making the statement. Chief Justice Cockburn refused to admit the statement, giving his decision in the words above quoted. Later he said, "It was

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something stated by her after it was all over, whatever it was, and after the act was completed." See also Chief Justice Cockburn in *Reg.* v. *Wainwright,* 13 Cox C. C. p. 171 (1871); and Chief Justice Bovill in *Reg.* v. *Pook,* 13 Cox C. C., note, p. 172 (1871). In *Thompson and Wife* v. *Trevanion,* Skinner's Reports, p. 402 (1693), Chief Justice Holt held in a civil action that a statement by a woman immediately upon receiving the hurt in question in the action, and, as the report says, "before she had time to devise or contrive anything for her own advantage, might be given in evidence." The decision rests upon the ground that the statement was made immediately upon receiving the injury. *Rex* v. *Foster,* 6 C. & P. p. 325 (1834), is another instance of a statement made immediately after the event. There evidence was submitted of a statement as to the cause of the accident made by the deceased at the instant of receiving the injury. In *Rex* v. *Lunny,* 6 Cox C. C. p. 477 (1854), at a trial for murder, a girl heard a cry and then found the deceased, weak and injured, who made a statement immediately on her coming up to him. Chief Justice Monahan admitted it as part of the *res gestæ*. In this case the rule as to admissibility seems not to have been so rigidly enforced, but neither that case nor any of the authorities would support the admission of the statement in the case now before us.

Assuming that your Lordships were of opinion that the boy's statement was admissible, this conviction, for other reasons, could not stand, and was properly quashed. The Court of Criminal Appeal acted upon the authority of *Rex* v. *Norton,* and did not think it necessary to consider any further point in the appeal. By virtue of s. 30 of the Children Act, 1908, 8 Edw. 7, c. 67, Christie could not be convicted unless the boy's testimony was "corroborated by some other material evidence in support thereof implicating the accused." There was no sufficient direction, and there was misdirection to the jury of the requisites of corroboration under this statute. Such direction as was given by the Deputy-Chairman was erroneous, inasmuch as it treated the statement by the boy, given in evidence by the mother and the constable, as corroboration of the boy's evidence implicating the accused. This is manifestly wrong. It was for the Deputy-Chairman to satisfy himself that there was evidence of corroboration fit to be submitted to the jury within the meaning of the statute, and then to direct them not to convict unless they accepted

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the evidence of corroboration. He did not give this direction, and, therefore, notwithstanding the view I have expressed about *The King* v. *Norton* and of the admissibility of the boy's statement in this case, I am of opinion that the conviction was rightly quashed, and that the appeal should be dismissed.

Lord Dunedin concurred with Lord Reading.

Order of the Court of Criminal Appeal affirmed and appeal dismissed.

Solicitors for the Respondent—*Avory, Son and Fairbairn.*

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE A. T. LAWRENCE AND MR. JUSTICE BANKES.

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On a charge of feloniously uttering a forged deed, evidence of other forged deeds of a similar character, but of subsequent date, being found in the defendant's possession on his arrest is admissible to rebut a defence denying guilty knowledge.

This was an appeal against conviction on a point of law. Appellant was convicted of uttering a forged deed, on the 20th March, 1914, at the Birmingham Assizes, before Pickford J., and was sentenced to seven years' penal servitude.

H. Maddocks for the appellant, who was not present. The appellant was charged with forging a deed on March 20th, 1912, and with uttering the same on April 15th following. On the first charge the appellant was acquitted, and on the second charge he was convicted.

The owner of the property was called, and several other witnesses, and the evidence of three witnesses was accepted by the judge to prove guilty knowledge, and, I submit, wrongly accepted. Such evidence should not have been admitted until accused had been found guilty on the first count of the indictment.

The evidence tendered related to two so-called forgeries—one was in relation to certain deeds belonging to a Mrs. Auchinvole: these deeds were handed to the prisoner for the purpose of raising money: they were signed, but Mrs. Auchinvole declared the signatures forgeries. The other case I will call the Munley forgery.

Both these deeds were subsequent transactions, and in no way connected with the previous one. I submit that the first transac-

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tion being an innocent one could not be made a guilty one, because others were guilty. See *Taverner*, Carr. Supp. 195, 1st ed. (1809), where it was unsuccessfully sought to put in evidence on an indictment for uttering forged bank notes that another note had been similarly uttered five weeks later; in *Moore*, 1 F. & F. 73 (1858), Byles J. held that the whole evidence must be confined to the case proceeded on, and not relate to other previous transactions; see also *Ellis*, (1910) 2 K. B. 746; 79 L. J. K. B. 841; 102 L. T. 922; 74 J. P. 388; 26 T. L. R. 535; 5 Cr. App. R. 41.

[BANKES J.: If a man is charged with passing counterfeit coin on Monday, could he not be shewn to have had counterfeit coin in his possession two days later ?]

Coinage offences are on a different footing, and evidence of the possession of other counterfeit coins is admissible by statute; except in such instances as come within the statute, evidence of the possession of other counterfeit coins would not be admissible. For analogy, see the case of *Carter*, 12 Q. B. D. 522; 53 L. J. M. C. 96; 50 L. T. 432, 596; 32 W. R. 663; 15 Cox C. C. 448; 58 J. P. 456 (1884): C. C. R.; here evidence had been admitted that shortly before the stealing of the property in question, the prisoner had been in possession of, but had disposed of, other stolen property of a similar character: it was held that this evidence was wrongly admitted, and that unless the goods were actually in possession of the prisoner at the time of the receiving charged, evidence of their previously being so is inadmissible.

If there were a series of dishonoured cheques involved, it would not be permissible to give evidence that the later cheques were dishonoured to prove that defendant had knowledge that the first cheque would be dishonoured. He might reasonably believe that he had funds to meet the first cheque, but he could not believe that about cheques at the end of the series. The dishonour of the early cheques would be evidence of guilty knowledge on a prosecution founded on the later cheques, but the converse would not hold.

In the *Auchinvole Case* there was a direct conflict of evidence;

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if there had been a mistake as to the signature, the whole charge would fall to the ground, it would be one of false pretences.

In the *Murley Case*, the deed was found among some papers in the prisoner's office; there was no evidence of forging.

I submit that subsequent transactions cannot be given in evidence.

Cranstoun, K.C. (with him *V. G. Milward*), for the Crown. An authority on this case is *Colclough*, 10 L. R. Ir. 241; 15 Cox C. C. 92 (1882): C. C. R.; here the prisoner was indicted for uttering law forms with forged stamps impressed, and documents with stamps made by the same instrument were admitted as evidence against him.

The deeds in the *Auchinvole* and *Murley Cases* were found in the prisoner's possession. The uttering in the main case took place on April 15th, and within a fortnight he was found possessed of the deeds in the *Auchinvole Case*, and five months later of the documents in the *Murley Case*.

It was clearly established that the prisoner uttered the forged deed, and obtained thereon £150. Was it fraudulent? The defence was that he did not know the document was false, but that he was a dupe of a man named Price. His case was that the transaction was an ordinary borrowing of £150 on the security of the lease. The prosecution may put in evidence similar facts to shew the state of the man's mind and the nature of the transaction.

[The LORD CHIEF JUSTICE: Is evidence of subsequent transactions alone sufficient to prove a state of mind in respect of the charge?]

Foster, Dears. C. C. 456; 3 C. L. R. 681; 24 L. J. M. C. 134; 1 Jur. (N. S.) 407; 6 Cox C. C. 521 (1855), was a case where on an indictment for uttering counterfeit coin evidence of a subsequent uttering by the prisoner of counterfeit coin of a different denomination was given to prove guilty knowledge. In *Hough*, 1 R. & R. 120 (1806), where a prisoner was charged with uttering a forged bill of exchange, evidence that other bills of the same kind were found on him is admissible. *Salt*, 3 F. & F. 834 (1862); *Rhodes*, (1899) 1 Q. B. 77; 68 L. J. Q. B. 83; 79 L. T. 360; 47 W. R. 121; 62 J. P. 774: C. C. R.; here the evidence

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was only of subsequent transactions. Wills J. said: "What difference does it make if they were immediately after the act complained of? If they formed part of the same system of fraud, I think it can make no difference. The only difficulty in this case is, I think, the long interval of time that elapsed between the act charged and the other acts. Very often the only nexus between such transactions is their proximity in point of time."

Maddocks. I submit that the ground in *Rhodes* is that the transactions were part and parcel of a system. Once establish system, and all transactions previous or subsequent are equally relevant. It is not alleged that there was any ground for charging "system" in this case.

[BANKES J.: In *Wilks*, 10 Cr. App. R. 16 (1914), on a charge of obtaining money by false pretences evidence of exactly similar conduct by the prisoner on a previous occasion was held admissible.]

The LORD CHIEF JUSTICE: The appellant was indicted for forging and uttering a lease of a house at Brighton. He was acquitted of forging, and found guilty of uttering. Counsel for the appellant has taken the only point worthy of discussion. Evidence was admitted during the hearing of two other deeds forged by the appellant in the *Auchinvole* and *Murley Cases*. This evidence was tendered to shew guilty mind and to rebut a defence of the appellant. What is meant by guilty mind in this connection is a mind guilty of the offence which is charged, and it does not mean evidence of a generally fraudulent or dishonest mind.

Evidence must not be of isolated transactions, but of transactions with some nexus or connection with the offence charged. Mr. Maddocks says that this evidence must be of transactions previous to the offence charged, and he has confined himself to opposing the admission of transactions which are subsequent on the ground that they cannot prove a guilty mind in reference to an offence committed at an earlier date.

In *Ellis*, 5 Cr. App. R. at 58, Bray J. cites Lord Alverstone C. J. (in *Bond*, (1906) 2 K. B. 394): "The general rule of law applicable in such cases can be clearly stated. It is that, apart from express statutory enactments, evidence tend-

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ing to shew that the accused had been guilty of criminal acts other than those covered by the indictment cannot be given unless the acts sought to be proved are so connected with the offence charged as to form part of the evidence on which it is proved."

Mr. Maddocks tried to bring himself within this, and to say that the evidence could only shew a general fraudulent disposition. It is not evidence of a general fraudulent disposition which is admissible, but evidence of frauds so connected with the forgery charged as to form part of the evidence in support of it, or to rebut a defence to the charge.

In *Francis,* L. R. 2 C. C. R. 128; 43 L. J. M. C. 97; 30 L. T. 503; 22 W. R. 663; 12 Cox C. C. 612 (1874), a case of false pretences, evidence of previous and similar false pretences was held admissible, but only in these particular transactions.

In *Rhodes,* (1899) 1 Q. B. 77, the Court said that it made no difference that the transactions which had been received in evidence were immediately after the act complained of. Wright J. put forward—tentatively no doubt—Mr. Maddocks's view. The Court came to the conclusion in that case that the evidence was properly admissible. Our conclusion in this case is that the evidence is admissible whether it concerns previous or subsequent acts, and that the appeal must fail.

Appeal dismissed.

Solicitor for the Appellant—*James Hall-Wright,* Birmingham.

S. W.

ERNEST FRANCIS WILLMONT.

No communication whatever may be made to a jury deliberating on its verdict, except on the request or by the permission of the judge.

This was an appeal against conviction by leave of Ridley J., and an application for leave to call further evidence. Appellant was convicted of having had carnal knowledge of a girl under the age of sixteen years, at the Lewes Assizes, on the 6th March, 1914, before Bray J., and was sentenced to fifteen months' imprisonment with hard labour.

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Hohler, K.C. (with him *T. Rowand Harker*), for the appellant, who was present.

It was proposed to call some of the jurors to prove that a communication had been made to them, while they were deliberating, by the Clerk of Assize.

The LORD CHIEF JUSTICE: We have been considering this case, and the view we have formed is that you are not entitled to give the evidence you propose to put before us. But we have had a report from the Clerk of Assize, and we think that the course which he took, no doubt with the best intentions, was irregular, and one which ought not to be allowed. We therefore should like to hear anything which counsel for the Crown wish to say, as we do not think the conviction can stand.

George Elliott, K.C. (with him *Raven*), for the Crown. I have no knowledge of the events referred to, nor have I any desire to press the conviction after that intimation.

The LORD CHIEF JUSTICE: The appellant was convicted of having had carnal knowledge of a girl of over thirteen and under sixteen years of age; he has appealed to this Court, not on the ground that the judge admitted any evidence that ought not to have been admitted, or gave the jury any wrong direction in law, but on the ground that there was a wrongful interference with the jury. It was sought to put in evidence the testimony of three jurymen, but the Court came to the conclusion that such evidence was inadmissible, and that it could not receive evidence from a juryman of what took place. The point was not argued as our observations made it unnecessary for Mr. Hohler to do so. We have received a report from the Clerk of Assize, in which he tells us quite frankly, as we had a right to expect, and as he was sure to do, what took place. Shortly stated it was this: the jury were out considering their verdict, and had been out for some time, and he went to their room, at the request of the learned judge, for the purpose of seeing if they had agreed or were likely to agree on their verdict. When he arrived there a question was put to him by one of the jurymen, which, with the best possible intentions, he unfortunately answered. A discussion took place in the form

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of questions by the jurymen, and answers and advice by him. After two discussions of this character, the jury came to an agreement and convicted the appellant. In the judgment of this Court the proceedings above described on the part of the Clerk of Assize were wholly irregular. He ought not to have entered into any discussion with the jury, or to have put any question to them except, in accordance with the learned judge's request, to have asked whether they had agreed upon their verdict, or were likely to come to an agreement, and he might have asked whether there was any question which they wanted to ask the judge, or whether they required any further direction from the judge, or whether there was any matter on which they required the assistance of the judge. Outside such matters no discussion ought to take place with the jury. The trial must take place in public, and the accused is entitled to the assistance of his counsel in all its proceedings, and to hear any directions or advice given to the jury. The whole direction must be by the judge in the full light of publicity.

Having come to the conclusion, therefore, that such a discussion took place, and that it was irregular, we have further to consider whether it was of such a character that we should disregard it, and, notwithstanding the irregularity, affirm the conviction. In our opinion the irregularity was substantial and not one which can be disregarded. We are unable to say that, but for the discussion and the advice to convict the appellant by the Clerk of Assize the jury would have come to an unanimous conclusion, and having formed that opinion, our judgment is that the conviction must be quashed.

Conviction quashed.

Solicitor for the Appellant—*C. W. Buckwell,* Brighton.

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WILLIE HART.

When a sexual offence is alleged, if consent is a good defence, the Court will quash a conviction if it is not satisfied that this defence has been rebutted.
The fact that the judge is dissatisfied with the verdict is only one element in the consideration of the Court.

This was an appeal against conviction on the certificate of the Deputy-Chairman who tried the case. Appellant was convicted of an indecent assault, at the County of London Sessions, on the 12th March, 1914; sentence was postponed.

E. J. Purchase for the appellant, who was not in custody. The appellant, who is admittedly a man of the highest character, was convicted of an indecent assault on a girl aged fourteen years. She lives with her father, and near her home is a club of which the appellant is steward. According to her story she was passing the club on the 23rd February, when she saw the appellant, who spoke to her, and asked if she would like a job; she said she would, and was taken upstairs to a place behind a curtain, where, according to her, the assault took place; she said the events occupied a quarter of an hour, but although she had seen another man in the club she never called out. They then went downstairs, where she waited while he got sixpence, which he gave her. She made no complaint on that day. On the following day she was sent on an errand by a woman who lived near her, and again passed the club; the appellant said, "Did you tell anyone?" and on her saying "No," he gave her twopence. The appellant admitted seeing her then, but said he had never seen her before; he said the girl was hanging about the club door, and he gave her twopence to buy sweets with, as he had to children before. The girl went home and made a complaint to her father, who came and taxed the appellant with the assault, which the appellant at once denied. The only possible corroboration suggested was an admission by him to the girl's father that he had given her two sums of money, but the father's evidence on the point was confused, and given in two different ways; the appellant denied it. The defence was a total denial, but it was necessary to set up consent as a second precautionary defence. The Deputy-Chair-

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man gave the strongest possible direction that although corroboration was not legally necessary, it was the highest degree desirable to have it in such a case. It is, therefore, not open to me to appeal on that ground, but only on the broad ground that the conviction was against the weight of the evidence. In *Bradley,* 4 Cr. App. R. 225; 74 J. P. 247 (1910), a conviction for rape was quashed on the ground that there was not sufficient evidence before the jury to justify them in concluding that the girl did not consent.

The appellant gave evidence, and in the witness-box blurted out a remark which the jury took to be a suggestion that the girl's father had tried to blackmail him; they evidently thought that this was a sudden invention by the appellant, but, in fact, instructions on the point were in counsel's brief at the police-court; counsel, however, does not go out of his way to make unpleasant suggestions. The jury were evidently impressed by this, as they asked for the father to be recalled on the point, and it may have been this incident that led to the appellant's conviction. In *Schrager,* 6 Cr. App. R. 253 (1911), the prisoner told an unnecessary lie, and the jury convicted him, although the bench of magistrates thought the evidence insufficient; this Court quashed the conviction, but Lord Alverstone C.J. said: "It must not be supposed that the fact that a judge disapproved of the verdict of the jury would alone be sufficient to upset a conviction." In *Parker,* 6 Cr. App. R. 285 (1911), the conviction was also quashed on the ground that there was a sufficient doubt as to the accuracy of the verdict for the Court to give the appellant the benefit of it; and it was mentioned that that was the view formed by Pickford J., who tried the case. Corroboration is always desirable in sexual cases, and especially when, as in this case, the evidence of the prosecutrix was not of a very satisfactory character.

On the question of consent the girl was never asked by counsel for the prosecution whether what was done was against her will; there was, therefore, no evidence that it was.

Metcalfe, for the Crown. The fact that the girl complained is evidence that what happened was against her will. The whole matter was before the jury who convicted the appellant, although

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the Deputy-Chairman did his best to secure his acquittal, and their verdict should stand.

The LORD CHIEF JUSTICE: The appellant was convicted of an indecent assault, and he appeals to this Court on the certificate of the Deputy-Chairman that the case is a proper one to be submitted to the Court. The case has been argued, first, on the ground that the verdict was unsatisfactory, and, secondly, that there was no evidence, or no sufficient evidence, that the girl did not consent. The case deals with an assault on a girl who was just fourteen years of age, and, therefore, the question of consent was material. No complaint can be made of the direction of the Deputy-Chairman, who indicated clearly to the jury that his own view was one favourable to the appellant. It is just one of those cases where it is difficult to say which is the exact piece of evidence that leaves an unsatisfactory impression on the mind. This Court has power to allow an appeal if it cannot be supported, having regard to the evidence, and looking at the whole of the evidence, and bearing in mind the observations of the Deputy-Chairman who heard the witnesses and observed their demeanour, we have come to the conclusion that this was not a satisfactory verdict, and that, therefore, the conviction must be quashed. While it must not be supposed that the mere fact that the judge who tried the case does not approve of the verdict is a sufficient reason for asking the Court to set it aside, it is a factor for consideration.

Conviction quashed.

Solicitors for the Appellant—*John Hill & Son.*

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BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE COLERIDGE, AND MR. JUSTICE SANKEY.

MARY ROUSE.

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The Court will reduce a sentence in order to give effect to the intention of the Court of trial.

This was an application for leave to appeal against conviction and sentence. Applicant was convicted of larceny as a servant, at the Buckinghamshire Quarter Sessions, on the 6th April, 1914, and was sentenced to nine months' imprisonment with hard labour.

Applicant, who was not present, was not represented by counsel.

THE LORD CHIEF JUSTICE (after giving the reasons of the Court for refusing leave to appeal against conviction): The sentence passed was not in our view excessive, but it is not clear that the intentions of the Chairman will be carried out. The appellant had been in prison awaiting her trial from the 27th February, and the Chairman intended the sentence of nine months' imprisonment to include this period. It is doubtful whether he had power to order the sentence to date from the 27th February, and therefore, without wishing to create any precedent, but in order that his intentions should be carried out, the Court directs that the period between the 27th February and the 6th April should count, and that the sentence to be served should be less by that period.

Sentence reduced.

A. L. B. T.

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A threat to injure property may be a "menace," within s. 45 of 24 & 25 Vict. c. 96, the Larceny Act, 1861.

On a charge of "blackmail," if the defence denies the agency of an intermediary, it is open to the prosecution to prove the agency of that person in a previous transaction alleged to be of a similar nature.

These were appeals against conviction on an indictment for felony on points of law, and applications for leave to appeal against conviction for misdemeanour and against sentences. Appellants were convicted of demanding money with menaces, on the 12th March, 1914, and of threatening to publish libels with intent to extort money, on the 18th March, at the Central Criminal Court, before Darling J. Boyle was sentenced to five years' penal servitude and to two years' imprisonment with hard labour, and Merchant to eighteen months' imprisonment on each indictment, the sentences in each case to run concurrently.

Foote, K.C. (with him *Paul Stomm*), for appellant Boyle, who was present, on the appeal against conviction for felony, only. The appellants were indicted with a man named Carter under the Larceny Act, 1861, 24 & 25 Vict. c. 96, s. 45, which enacts that "Whoever shall with menaces or by force demand any property, chattel, money, valuable security, or any other valuable thing of any person, with intent to steal the same, shall be guilty of felony," and the question of law raised is whether what Boyle did could be considered, in law, a menace. It is not necessary to go into the evidence; the menace suggested was a threat to attack a company of which the prosecutor, Barnett, was chairman, in a newspaper called *Rubber and Oil*, so as to depreciate the market value of the shares in that company. The threats were contained partly in letters, partly in the newspaper, and partly in an interview which Carter, who was an emissary of Boyle, had with Barnett, and who said that unless money was paid there would be an attack on the company in the paper which would knock five shillings off the value of every share. It must be taken that the jury found that such threats were used, but my submission is that to be within the statute the menace must be a threat of criminal violence or of injury to character

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(and not all injuries to character). The menace must also be such as would put the person threatened into such a state of fear as to unnerve him and interfere with his volition and judgment.

The word "menace" comes into the Larceny Act, 1861, through a series of statutes, the earliest of which is 7 Geo. 2, c. 21, s. 1 (1732), which was headed "An Act for the more effectual punishment of assaults with intent to commit robbery." The Act did not create a new offence, but increased the punishment that could be imposed for a particular kind of common law robbery, and it enacted that "If any person with any offensive weapon or instrument, unlawfully and maliciously assault, or shall by menaces, or in or by any forcible or violent manner, demand any money, goods or chattels of or from any other person or persons with a felonious intent to rob or commit robbery upon such person or persons . . . . he shall be adjudged guilty of felony." Then by 30 Geo. 2, c. 24 (1756), it was made a crime knowingly to send or deliver a letter threatening to accuse any person of any crime punishable by law with death, transportation, pillory, or any other infamous punishment, with intent to extort money from the person so threatened to be accused. These two offences thereafter are dealt with together in the statutes.

The earliest use of the word "menace" is in Hale's Pleas of the Crown (1800 ed.), Vol. I., p. 534, where the case of *Harman*, 2 Rol. Rep. 154 (1620), is cited; in that case the offence was held to be larceny and not robbery, because the words of menace, which were a threat of criminal violence, were only used after the taking of the purse. After the passing of the statutes referred to came three cases dealing with threats to accuse a person of an infamous crime. In *Jones*, 1 Leach, C. C. 139 (1776), the judges were of opinion that although money had been obtained in a fraudulent way, and under a false pretence, yet it was a pretence of a very alarming nature, and that a sufficient degree of force had been made use of in effecting it, to constitute the offence of robbery. In *Donnally*, 1 Leach, C. C. 193; 2 East, P. C. 713, 783 (1779), the judges held that the threat was a threat of personal violence. In *Hickman*, 1 Leach, C. C. 278; 2 East, P. C. 728 (1783), the prosecutor said that he parted with his money for the sake of his character only, and not from any apprehension of danger to his person; the jury convicted, but the matter was submitted to the con-

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sideration of twelve judges, who held that "The true definition of robbery is the stealing, or taking from the person, or in the presence of another, property of any amount, with such a degree of force or terror, as to induce the party unwillingly to part with his property; and whether the terror arises from real or expected violence to the person, or from a sense of injury to the character, the law makes no kind of difference."

The matter is dealt with in Hawkins's Pleas of the Crown, Vol. I., p. 235 (7th ed.), under the heading of "Robbery," where it is said: "But it is not necessary that the fact of actual fear should either be laid in the indictment, or be proved upon the trial, it is sufficient if the offence be charged to be done *violenter et contra voluntatem*. And if it appear upon the evidence to have been attended with those circumstances of violence or terror, which in common experience are likely to induce a man to part with his property against his consent, either for the safety of his person, or for the preservation of his character and good name, it will amount to a robbery." Until then there is no trace of any threat being sufficient unless it were to the person or character, and it must be a threat which puts a man into a state of terror or apprehension. In *Southerton*, 6 East, 126; 2 Smith, 305; 8 R. R. 428 (1805), it was held that "threatening by letter or otherwise to put in motion a prosecution by a public officer to recover penalties for selling Fryar's Balsam without a stamp for the purpose of obtaining money to stay the prosecution, is not such a threat as a firm and prudent man may not be expected to resist, and therefore is not in itself an indictable offence at common law, although it be alleged that the money was obtained; no reference being made to any statute which prohibits such attempt," and Lord Ellenborough C. J. said: "To obtain money under a threat of any kind, or to attempt to do it is no doubt an immoral action; but to make it indictable the threat must be of such a nature as is calculated to overcome a firm and prudent man," and after citing *Woodward*, 11 Mod. 137 (1708), he added: "The law distinguishes between threats of actual violence against the person, or such other threats as a man of common firmness cannot stand against, and other sorts of threats." While the question whether there was a menace is no doubt one for the jury, there was in the present case no evidence fit to be left to the jury of any threat which an ordinary man would not stand up against.

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[LORD COLERIDGE J.: The tendency has been to enlarge the scope of the threats; *Southerton* goes further than *Wood and Knewland*, 2 Leach, C. C. 721; 2 East, P. C. 732; 1796.]

The Libel Act, under which the appellant was also convicted, would have been unnecessary if a threat to libel was enough to constitute a menace.

7 Geo. 2, c. 21, was repealed by 4 Geo. 4, c. 54, s. 5, in 1823, which enacted that "If any person . . . . shall by menaces or by force maliciously demand money, security for money, goods or chattels, wares or merchandise, of any other person, with intent to steal the same, or shall maliciously threaten to accuse any other person of any crime punishable by law with death, transportation or pillory, or of any infamous crime, with a view or intent to extort or gain money, &c. from the person so threatened . . . . he shall be adjudged guilty of felony." The Act did not purport to alter the law, and the latter part of the section would have been unnecessary if the word "menace" included such threats. The words "menaces or by force" are preserved in the present Act. The laws relative to larceny were consolidated in 1827 by 7 & 8 Geo. 4, c. 29; s. 6 dealt with demands accompanied with menaces or by force, s. 7 with threats to accuse a party of an infamous crime, which crime was defined in s. 9, and s. 8 dealt with both such threats when made in writing. The words "with menaces or by force" were preserved in 7 Will. 4 & 1 Vict. c. 87, s. 7 (1837). Then came the Libel Act, 1843, 6 & 7 Vict. c. 96, known as Lord Campbell's Act.

[LORD COLERIDGE J.: *Reane*, 2 East, P. C. 734; 2 Leach, C. C. 616 (1794), also shews how the scope of the threats has been enlarged. It was held there that there could be no conviction, because the prosecutor had not actually been in fear.]

In *Smith*, 1 Den. C. C. 510; 2 Car. & K. 882; 19 L. J. M. C. 80; 4 Cox C. C. 42; T. & M. 214; 14 Jur. 192 (1849), a threat to burn the prosecutor's bank, which might stop it for ever, was held to be a threatening letter within 7 & 8 Geo. 4, c. 29, s. 8, and it was also held that "The rule that a threat is not of a criminal character, unless it be such as may overcome the ordinary

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will of a firm man, has reference to the general nature of the evil threatened, and not to the probable effect of the threat on the mind of the particular party addressed." Then followed the Larceny Act, 1861, 24 & 25 Vict. c. 96, under which the appellant was convicted. In *Walton*, 32 L. J. M. C. 79; 9 Cox C. C. 268; L. & C. 288; 9 Jur. (N. S.) 259; 7 L. T. 754; 11 W. R. 348 (1863), a threat to levy an unauthorised distress was found by the jury to be a menace, and it was held that "the menaces must be of such a nature and extent as to unsettle the mind of the person on whom it operates, and take away from his acts that element of free voluntary action which alone constitutes consent. It is a question for the jury whether the evidence in any particular case comes within that principle." In that case there were circumstances of intimidation. Finally, there came the case of *Tomlinson*, [1895] 1 Q. B. 706; 64 L. J. M. C. 97; 15 R. 207; 72 L. T. 155; 43 W. R. 544; 18 Cox C. C. 75—C. C. R., which Darling J. followed. It was there held that in order to constitute the offence of sending a letter demanding money with menaces, within the meaning of 24 & 25 Vict. c. 96, s. 44, it is not essential that the "menace" should be a threat of injury to the person or property of the prosecutor, or a threat to accuse him of a crime; the offence may be committed if there be a threat to accuse him of misconduct not amounting to an offence against the criminal law. In that case no counsel appeared on either side, and the history of the statutes was not gone into; the case came within injury to character, so it is not necessary for me to say it is wrong, although it is submitted that the judgment of Wills J., who said: "That which will do a person harm comes, in my opinion, within the meaning of 'injury,'" was too wide. The section was not passed in order to make anything a "menace" which was not one before.

Even if the threat in this case was capable of being regarded as a menace, the jury ought to have been told that they should not find it one unless they found that the prosecutor was terrified out of his senses. There is no suggestion of misdirection in the notice of appeal, but the summing up by the learned judge bears upon the point now being argued.

[The LORD CHIEF JUSTICE: You can take the point if you wish.]

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The judge told the jury that menaces addressed to the directors to do an injury to the shareholders would be within the statute; this begged the whole question. He also said that the sort of menace which would make a man take certain steps "for the sake of peace and quiet, for the sake of not having his investments disturbed" was within the statute; this was misdirection. This case goes further than any previous case has gone; the law has been strained in order to punish the appellant unduly.

This appeal is based also on misreception of evidence. The main offence in the case was said to have occurred at an interview on the 20th November, and there was one letter written before that date, namely, on the 11th November; a man named Webb acted as an intermediary at that interview, and evidence was given that in the previous May Carter, on behalf of the appellant, had been to see Webb with reference to the business of one Newberry; this was represented as having been a blackmailing transaction, and was used to shew that the dealings with Barnett were of the same nature. It was suggested that the evidence was necessary to shew how Carter and Webb became acquainted, but even if so more was admitted than ought to have been, especially evidence that in the Newberry case a sum of £80 was paid in gold. The judge recalled the appellant and also Carter after they had both given evidence, and cross-examined them at great length with regard to this incident. It is true that Mr. Waugh, who represented the appellant at his trial, cross-examined about the lengths to which legitimate journalism may go, but this did not make the evidence admissible; further, it had already been opened in detail by Mr. Muir. (He was stopped by the Court.)

Appellant, *Merchant*, in person, adopted Mr. Foote's argument.

R. D. Muir (with him *Cecil Whiteley* and *Leycester Muir*), for the Crown. On the question of the admissibility of this evidence, the charge being one of blackmail, the felonious intent with which the acts charged were done was really the main issue. On this question evidence of other similar acts, especially when systematic, is admissible: *Bond*, [1906] 2 K. B. 389; 75 L. J. K. B. 693; 95 L. T. 296; 54 W. R. 586; 70 J. P. 424; 21

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Cox C. C. 252; 22 T. L. R. 633—C. C. R.; *Ollis,* [1900] 2 Q. B. 758; 69 L. J. Q. B. 918; 83 L. T. 251; 49 W. R. 76; 64 J. P. 518; 19 Cox C. C. 554—C. C. R. The Newberry matter was referred to in interviews between Merchant and Webb, and it would have been unintelligible to the jury if the explanatory evidence had not been before them.

The evidence was also admissible to rebut a defence open to the prisoners, and such a defence may be anticipated: *Makin* v. *Attorney-General for New South Wales,* [1894] A. C. 57; 63 L. J. P. C. 41; 6 R. 373; 69 L. T. 778; 17 Cox C. C. 704; 58 J. P. 148. When I opened the evidence to the jury I had in mind the cross-examination on behalf of the prisoners in the police court, which was directed to shew that all that had been done was legitimate journalistic work.

[The LORD CHIEF JUSTICE: In *Mason* [above, p. 169], we held that such evidence was properly admitted.]

So also in *Wilks,* 10 Cr. App. R. 19 (1914), and *Bond.* There must be a connection between the act for which the prisoner is indicted and the acts of which evidence is sought to be given, and they must relate to the same kind of offence: *Ellis,* [1910] 2 K. B. 746; 79 L. J. K. B. 841; 74 J. P. 388; 102 L. T. 922; 26 T. L. R. 535; 5 Cr. App. R. 41; that was the case here. The great bulk of the evidence for the Crown was directed to shew that the acts were done as part of the business of a blackmailer.

On the first point raised on behalf of the appellant, the true test is laid down in *Walton,* where Wilde B. said that the only limitation on the ordinary meaning of the word "menace" was contained in the words "with intent to steal," and "the essential matter is that it be of a nature and extent to unsettle the mind of the person on whom it operates, and take away from his acts that element of free voluntary action which alone constitutes consent." It is not a necessary ingredient of larceny that violence should be used: *MacGrath,* L. R. 1 C. C. R. 205; 11 Cox C. C. 347; 39 L. J. M. C. 7; 21 L. T. 543; 18 W. R. 119 (1869). In *Robertson,* 10 Cox C. C. 9; L. & C. 483; 34 L. J. M. C. 35; 11 Jur. (N. S.) 96; 11 L. T. 386; 13 W. R. 701 (1864), Pollock C. B., said: "It was said that this was not a menace within the meaning of

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the statute, because it was a threat to accuse of a non-existing offence. We think there is no ground for that objection. If a policeman states that he is acting under authority, and that it is his intention to exercise the authority which he professes to have, unless money is given to him, that is a menace within the statute."

[The LORD CHIEF JUSTICE: That involves a threat of violence or detention.]

In *Smith*, Wilde C. J., said: "Every case of this nature must be judged of by its circumstances alone. The demand of money here is clear and explicit. The consequences denounced against refusal—namely, the ruin of the bank, is as obviously a threat": 4 Cox C. C. 48. The nature of the blackmail and the serious character of the menace employed were such that the offence in the present case could not be adequately punished under the Libel Act. *Tomlinson* covers the facts of the case, and an extension of the interpretation of "menace" has been gradually arrived at.

On the application of the appellant Boyle, the Court granted an adjournment of the application for leave to appeal against the conviction for misdemeanour for a week.

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Herbert Jacobs for the appellant Merchant. The ground on which I appeal is that there is no evidence connecting Merchant with these transactions. There is no evidence to connect him with either *Morrison's Case*, *Boxall's Case*, or *Broadbridge's Case*. There were no letters written by Merchant, no interviews with him, and no threats. There was no evidence that Merchant had ever contributed to *Rubber and Oil*. There was some evidence to shew a general association between him and Boyle. Boyle, in the witness-box, called Merchant his partner. Merchant cannot be made liable thus without evidence to connect him with the criminal transactions, and there must be something more than evidence of association. The civil law, of course, is different, but there is nothing in criminal law to make one partner thus liable for the acts of another.

Cecil Whiteley, for the Crown. It was proved that Merchant

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was carrying on the business of *Rubber and Oil* under the false name of Hayes, and was, therefore, conscious of the real purpose of the paper. There was evidence given that letters were received for Merchant. Merchant was the secretary of the Rubber and Oil Corporation, and only he and Miles had power to sign the cheques: there were two large sums paid in cash into that banking account over which Merchant had the power of drawing.

Merchant gave instructions that letters should be taken in at 11 and 12, Buckingham Street; Merchant used the offices at York Buildings and Thames Chambers; moreover, the proof sheets of *Rubber and Oil* were corrected by Merchant. Letters addressed to *Rubber and Oil* were taken by Merchant from Buckingham Street to Thames Chambers.

A printer gave evidence that Merchant asked him for an estimate for printing *Rubber and Oil*, and Merchant paid for this printing.

Boyle gave a great deal of evidence implicating Merchant; Merchant himself did not give evidence.

Jacobs: Nothing more has been done than to shew some association between the two. In this case there must be something to connect Merchant with the specific offence with which he is charged. There was plenty of legitimate business. Why should he be taken to be connected with the wrongful business? There must be evidence to connect him with some part of the transactions; I submit that without this it is not safe to convict.

Appellant *Boyle* and *Jacobs* addressed the Court with regard to reduction of the sentences.

The LORD CHIEF JUSTICE read the following judgment:—

The appellants were indicted with another person under s. 45 of the Larceny Act, 1861, which makes it a felony to demand money with menaces, or by force, with intent to steal the same.

After a lengthy trial the three accused were convicted, and Boyle was sentenced to five years' penal servitude, and Merchant to eighteen months' imprisonment without hard labour,

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Both appellants appeal against their conviction, upon two grounds:—

(1) That the facts, as proved, do not constitute the offence charged against them.

(2) That evidence was wrongfully admitted by the learned judge at the trial.

With regard to the first point, the facts may be shortly stated as follows:—

The prosecutor, one Richard Whieldon Barnett, was Chairman of a company known as the Roumanian Consolidated Oilfields Ltd., which had an issued capital of over a million sterling. That company had been the subject of attacks in a paper known as *Rubber and Oil*, upon the 28th July and the 20th August, 1913.

In the following November the appellants threatened to continue the attacks upon the company. They represented that they had done very well from the market standpoint out of an attack on a rival company, and that they thought a similar attack on the Roumanian Consolidated Company would easily reduce the market price of the shares by five shillings per £1 share. They demanded from Mr. Barnett the payment of a considerable sum of money and the delivery to them of a large number of shares as the price of their silence.

It was contended by counsel for the appellants that these facts did not bring the conduct of the prisoners within the words of s. 45 of the Larceny Act, 1861. The answer to this contention depends upon the meaning to be attributed to the word "menaces" as used in that section.

A number of old statutes and cases were cited to us with the object of establishing that a menace must either be a threat of physical violence, or a threat of injury to character, and it was said that the threat used by the appellants did not come within either of these categories, inasmuch as it amounted, at most, to a threat to depreciate the market value of the property of the shareholders of the company by adverse criticism or comment which would reduce the price obtainable in the market for shares in the company, but would not and could not affect the intrinsic value of the property of the company or its shareholders.

We do not think that the meaning of the word "menaces" in the section is so restricted. Whatever may have been the view

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in earlier days under the older statutes and decisions, a wider meaning has been given to the word by later decisions, beginning with *The Queen* v. *Walton and Ogden*, 9 Cox C. C. 268, decided by a very strong Court more than fifty years ago. That case was argued before Erle C. J., Blackburn and Keating JJ., Wilde B., and Mellor J., on an indictment under the same section of the statute now under review. In delivering the considered judgment of that Court, Baron Wilde laid down what we think is the true test. He says: "Where, then, is the proper limit to the operation of this section? It is to be found in the words 'with intent to steal.' Nothing is said about violence in conjunction with menaces, still less of violence to the person, as distinct from violence to property. There is no express limit except in the words 'with intent to steal.'"

He then proceeds to discuss the incidents attending the demand of money or property which are necessary to constitute stealing. In the result he arrives at the conclusion that if a man is induced to part with his money or property through fear or alarm he is no longer a free agent, and is no longer capable of parting with his property with his consent; his judgment is not based solely upon the threat of physical violence. If the threat was of a character to produce in an ordinary man such a degree of fear or alarm as would "unsettle his mind . . . . and take away from his acts that element of free voluntary action which alone constitutes consent," and was made with that intent, it would constitute the offence under the section now under consideration, notwithstanding that the threat was not of physical violence or of injury to character.

A similar view was taken of the meaning of the word as used in the previous section of the Larceny Act, 1861, by the Court of Crown Cases Reserved in *The Queen* v. *Tomlinson*, [1895] 1 Q. B. 706. Lord Russell of Killowen C. J., delivered the judgment, which had the concurrence of the other judges, wherein he held that the word "menaces" must be construed in a wide sense, and, moreover, that it was not confined to a threat of injury to the person or *property* of the person threatened. Some of the expressions used by Mr. Justice Wills in that case may have gone too far, but we agree with him that the doctrine that the threat must be of a nature to operate on a man of reasonably sound or ordinarily firm mind should receive a liberal construction in practice.

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We think it would be unwise to attempt to lay down any exhaustive definition of the words of the section. The degree of fear or alarm which a threat may be calculated to produce upon the mind of the person on whom it is intended to operate may vary in different cases and in different circumstances. A threat to injure a man's property may be more serious to him and have greater effect upon his mind than a threat of physical violence. When there is evidence of such a threat as is calculated to operate upon the mind of a person of ordinarily firm mind, and the jury have been properly directed, it is for them to determine whether in fact the conduct of the accused has brought them within the section, and whether in the particular case the "menace" is established. If the threat was of such a character that it is not calculated to deprive any person of reasonably sound or ordinarily firm mind of the free and voluntary action of his mind, it would not be a "menace" within the meaning of the section.

In our judgment, when a man, with intent to steal, threatens either to do violence to the person of another, or to commit acts calculated to injure the property or character of another, it is a "menace" within the meaning of the section. Although in this case there has been some criticism of part of the direction by the learned judge upon this point, we think that in substance, and viewing the summing up as a whole, his direction to the jury was in accordance with the views we have expressed, and therefore any complaint of misdirection fails.

In the judgment of the Court there was ample evidence fit for the consideration of the jury at the close of the case for the prosecution that the appellants were guilty of the offence charged. The learned judge was right in not stopping the case at that stage, and eventually was right in submitting the case to the jury. The Court is of opinion that the jury, upon a direction by the judge, which we hold to have been proper and adequate, were entitled to find that the conduct of the appellants had brought them within the section, and the appeal on the first point therefore fails.

With regard to the second point, the facts may be stated as follows:—

It was complained, in respect of the charge, that the payment of the money, £600, had been demanded in gold, so as to conceal

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the names of the recipients and the transaction generally. Evidence had been admitted to prove that in the previous May a transaction of a character, in all substantial respects similar to that charged, had taken place, as a result of which one Newbery had paid over a sum of £80 in gold to a representative of the paper *Rubber and Oil* and of the appellants.

It was contended that such evidence was not admissible in law, and that, having been admitted, it seriously prejudiced the appellants, and therefore the conviction should be quashed.

We are of opinion that the contention is wrong, and that the evidence was properly admitted.

The learned counsel for the prosecution anticipated that a defence would be set up that the paper *Rubber and Oil* was conducted in good faith and as a legitimate journalistic enterprise, and that the conduct of the accused in relation thereto was inconsistent with any criminal intent, whereas the case for the prosecution was that, upon the true state of the facts, such a defence was wholly unfounded and untrue.

That his anticipation was justified was shewn by the cross-examination of the witnesses for the Crown.

The law regulating the admission of such evidence was authoritatively laid down by the Lord Chancellor in *Makin* v. *Attorney-General for New South Wales*, [1894] A. C. 65, in the following passage: "In their Lordships' opinion the principles which must govern the decision of the case are clear, though the application of them is by no means free from difficulty. It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused. The statement of these general principles is easy, but it is obvious that it may often be very

difficult to draw the line and to decide whether a particular piece of evidence is on the one side or the other."

No doubt differences of judicial opinion have arisen with regard to the application of this principle in subsequent cases (see *The Queen* v. *Ollis*, [1900] 2 Q. B. 758, and *The King* v. *Bond*, [1906] 2 K. B. 389). In the latter case the prisoner, a medical man, was indicted for feloniously using certain instruments on a certain woman with intent to procure her miscarriage. At the trial evidence was tendered on behalf of the prosecution to shew that some nine months previously the prisoner had used similar instruments upon another woman with the avowed intention of bringing about her miscarriage, and that he had then used expressions tending to shew that he was in the habit of performing similar operations for the same illegal purpose. The evidence was admitted, and the prisoner was convicted.

We think that the true ground upon which such evidence is admissible is, that it is relevant to the question of the real intent of the accused in doing the acts.

Its object is to negative such a defence as mistake or accident or absence of criminal intent, and to prove the guilty mind, which is the necessary ingredient of the offence charged.

There is, as is apparent from a consideration of the authorities, an essential difference between evidence tending to shew generally that the accused has a fraudulent or dishonest mind, which evidence is not admissible, and evidence tending to shew that he had a fraudulent or dishonest mind in the particular transaction, the subject-matter of the charge being then investigated, which evidence is admissible. It has been laid down that to make such evidence admissible there must be a nexus or connection between the act charged and the facts relating to previous or subsequent transactions which it is sought to give in evidence. (See *The Queen* v. *Rhodes*, [1899] 1 Q. B. 77, per Lord Russell C. J., and *The King* v. *Ellis*, [1910] 2 K. B. 746.) In the recent case of *The King* v. *Mason* [above, p. 169], this Court followed the decision of *The Queen* v. *Rhodes*, and came to the conclusion that the evidence of similar transactions subsequent to the charge was admissible in order to rebut the defence set up.

It would serve no useful purpose to discuss in detail the relevant facts in this particular case. It is sufficient to say that the prosecution's case was that the paper *Rubber and Oil* was carried

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on by the appellants for the purpose of making and enforcing such demands for money as were made in this case, and that it was not carried on as a legitimate journalistic enterprise, and that various devices were resorted to for the purpose of concealing the connection of the appellants with the operations of this paper. Whereas one of the defences was that *Rubber and Oil* was a financial newspaper existing for the purpose of dealing with undertakings connected with rubber and oil, and that one of its legitimate functions was to comment upon and criticise the affairs of the company in question, and its management by the chairman.

Again, the case for the prosecution was that Carter, in demanding the payment of the money, and in gold, was acting as the agent of the appellants, whereas the defence was a denial of this fact. Carter had acted as the agent of Boyle in demanding the £80 from Newbery in gold. It became of distinct importance to determine which of these views was correct, and we are of opinion that upon the above-mentioned principles of law, evidence was admissible of the circumstances of the payment of the £80 in gold, and of Carter having acted as agent for the appellants in the matters relating thereto, as such evidence tended to rebut defences of the accused.

We are not attempting in this case to lay down any new principles of law. We are merely applying well-established principles to the particular facts of this case.

For these reasons we are of opinion that the appeal fails, and that the conviction must be affirmed.

His Lordship added:—

There is abundant evidence of the connection of the appellant Merchant with the other prisoner.

We have allowed Boyle to address the Court in person on the sentence: with reference to his health, the authorities in charge of him will be able to judge as to this; it is not a matter for us.

We are of opinion that Mr. Barnett, who is responsible in the main for this prosecution, has rendered a distinct public service. Such cases occur more frequently than is supposed, and it is very difficult to bring persons of this kind to justice.

To any person engaged in financial transactions in the City,

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it must be a very serious matter to have a paper published with posters attacking the shares of their company, and influencing market operations in a way which might be very serious to the parties themselves, and might involve some persons in ruin.

The offence is generally known as blackmail; it is one of the most detestable of all the crimes which come before this Court. It is a matter which deserves very severe punishment.

In our judgment on the facts as proved, no complaint can be made as to the sentence passed upon Boyle or, indeed, upon Merchant; our only comment as regards the latter is that he has been leniently treated.

Appeals dismissed.

Solicitors for Appellant Boyle—*Harry Wilson & Co.*

Solicitor for Appellant Merchant—*Percy R. Gibbs.*

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WILLIAM HENRY COOPER.

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Medical evidence that the bodily state of a child is compatible with her story is corroboration thereof.

Severity of sentence.

An untried and unconfessed indictment should not be considered in passing sentence.

This was an appeal against conviction and sentence. Appellant was convicted on the 26th March, 1913, at the Central Criminal Court, before Atkin J., of incest, and was sentenced to ten years' penal servitude.

Arthur Bryan, for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant was convicted of committing the crime of incest with his daughter Olive, being under the age of thirteen years. There are two series of charges in this case, first, incest with Olive Cooper aged eight years, during the four months of 1913, and, secondly, incest with another daughter, Ivy, who is five years older, at prior dates in 1911 and 1912: the second charge was not proceeded upon.

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Appellant's suggestion is that Olive was incited to make up the story by her eldest sister Edith, but there was no evidence of this at the trial. I desire to base this appeal, first, on the wrongful reception of evidence relating to acts at Birmingham; and, secondly, on the ground that the verdict is one which cannot be supported, having regard to the fact that there was no corroboration of the child's story directly implicating appellant. The prisoner's wife died in January, 1912, they were then living at Tottenham; and in June or July, 1912, the prisoner, with these two little girls and a baby, moved to Birmingham. He did sleep at Birmingham in the same bed with Olive, as there were only two rooms. The offences, however, with which the prisoner is charged were alleged to have been committed after he moved to East Ham in September, 1913.

Evidence was given that before January, 1913, the prisoner had connection with Olive—some twelve months or more before the trial. I submit that the evidence of this is too remote, and the lapse of time was such as to make it unreliable, especially as the child was only seven years old at the time.

In *Ball*, A. C. 47; 80 L. J. K. B. 691; 103 L. T. 738; 75 J. P. 180; 22 Cox C. C. 366; 55 S. J. 139; 27 T. L. R. 162; 6 Cr. App. R. 31 (1911), the circumstances were very different: it was a case of incest of brother and sister, and the sister was of age. In the present case the evidence of this small child of what had occurred twelve months previously might, under the circumstances, simply prejudice the jury without helping the case. The child had many relatives at Birmingham to whom she could have complained, and the only complaint about this was made many months later to her sister. Nor was any complaint ever made at the time as to the charges at East Ham.

There was no other material evidence to corroborate the child. There was no such evidence on the part of the landladies of the two sets of lodgings at East Ham which implicated the father with this offence.

The doctor said that there had been penetration, but not necessarily by the male organ: it might have been by some other substance. The child said that when playing at Birmingham other little girls were rude to her and were "doing the same as dada."

The judge said in his summing up, "you cannot act upon the

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evidence of the child alone" as to these charges; I urge that there was no corroborative evidence.

[LORD COLERIDGE J.: Do you or do you not say that the medical evidence is corroborative?]

It is not corroborative evidence implicating the prisoner; moreover, as to the sentence, the man has hitherto borne an excellent character, and I ask your Lordships to consider a reduction.

E. Percival Clarke, for the Crown (who was called upon on the question of sentence only). This was regarded as an exceptionally serious case. He was charged on two indictments with offences with two daughters, but only tried on one.

[The LORD CHIEF JUSTICE: In my view the Court ought not to take into account another indictment on which the prisoner has not been tried when he does not admit the charge. There would be nothing to shew that it has been taken into account, and he might be tried and sentenced on it later on.]

Hearsay evidence as to character is admissible after conviction: *Campbell,* 6 Cr. App. R. 131; 75 J. P. 216; 55 S. J. 273; 27 T. L. R. 256 (1911).

[The LORD CHIEF JUSTICE: That case refers to indictments under the Prevention of Crime Act, 1908.]

The appellant was not sentenced for the other offence, but it was proper that the judge should know the man's character. The Incest Act, 1908, s. 1, provides that if the girl is under thirteen years old the prisoner may be sentenced as if he had been convicted under the Criminal Law Amendment Act, 1885, s. 4, for which the maximum sentence is penal servitude for life.

The LORD CHIEF JUSTICE: The appellant was convicted of incest with his daughter, a girl of eight years of age, and was sentenced to ten years' penal servitude. Mr. Bryan has argued that the conviction ought to be quashed on two grounds: firstly, for misreception of evidence, and, secondly, that the verdict could

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not be supported because there was no corroboration, or insufficient corroboration, of the girl's evidence implicating the accused. The point as to misreception of evidence fails on the authority of *Ball* and similar cases. It is doubtful whether anything very material was added by proving the earlier offence, but it was clearly admissible in law, and all that can be said is that the judge might have suggested to the Crown that the evidence should not be pressed. As to corroboration of the girl's story, if it was accepted by the jury, sufficient can be found in the medical testimony which is the main corroboration, because the evidence of the two women where she lodged did not really implicate the accused. Although corroboration is not required by statute, the judge warned the jury that it was desirable to have it, and indicated the evidence that was possible corroboration. If the jury believed the girl's story, it was proved that the appellant had slept with her on various occasions, and no other injury was suggested which would account for the dilatation of her private parts or the rupture of the hymen. The jury came to the conclusion that the girl's story was true, and the appeal against conviction fails.

On the question of sentence it is always difficult to say what is the proper sentence in such a case, but our conclusion, after considering all the circumstances with great care, is that it should be reduced to one of five years' penal servitude.

Sentence reduced.

S. W.

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ALLAN CAMERON.

The Court may vary a verdict without altering sentence.

This was an appeal against conviction and sentence by leave of Scrutton J. Appellant was convicted of unlawful wounding, on the 31st March, 1914, at Leeds City Sessions, and was sentenced to eighteen months' imprisonment with hard labour.

Valentine Ball for the appellant (under s. 10 of the Criminal Appeal Act), who was present. On the indictment, as it was

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framed in this case, the appellant could not be found guilty of unlawful wounding; see Archbold, 24th ed., pp. 908, 938

[LORD COLERIDGE J.: You may take it that that is so, but the Court has power to deal with the matter under the Criminal Appeal Act, s. 5 (2).]

On the evidence the proper verdict should be one of common assault, and that is the verdict which the Court would be justified in substituting for that returned. It is the verdict the jury would have returned if they had been properly directed. It is clear that the prosecutor hit the appellant first, and the evidence is very vague on the question whether he had a knife or not; he said he had only a steel ruler, and that he called for a knife to cut the muffler which was choking him.

The sentence passed cannot stand if the conviction is only for common assault. Although the appellant has twenty-nine convictions for drunkenness, assaults, gaming, &c. since 1894, there has been no conviction for assault since 1902. He was placed under probation for a year in 1912, and I have a letter from the probation officer stating that he was in employment most of the time, and conducted himself fairly well.

Hallett, for the Crown, was not called upon.

LORD COLERIDGE J.: In this case the appellant was convicted of unlawful wounding, and sentenced to eighteen months' imprisonment with hard labour, and the first point is one of law against the conviction. The indictment against the appellant contained two counts, the first charging him with "unlawfully and maliciously inflicting grievous bodily harm," and the second with "assaulting, beating, wounding, &c. so as to occasion actual bodily harm." No doubt there were three alternatives before the jury; they could convict on either of these counts, or of a common assault. The jury convicted of unlawful wounding, and as it is only possible so to convict when a count alleges felonious wounding, the verdict was irregular. The Assistant-Recorder took the view which he was entitled to take, that the evidence justified a conviction on the first count. At the conclusion of his summing up counsel for the Crown reminded him of the alternative count, and then, as

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sometimes happens, instead of looking at the indictment, he told the jury that they had two other alternatives open to them; they could convict of unlawful wounding or of common assault. The jury were clearly of opinion that the facts were too grave to justify a conviction for common assault, for which the maximum imprisonment is twelve months; they took the middle alternative and found unlawful wounding. It is clear that they intended to find a verdict for the intermediate alternative. If the facts justify a verdict on the second count the Court has power under s. 5 (2) of the Criminal Appeal Act to correct the error. Acting under those powers the Court is clearly of opinion that the verdict of the jury would have been one under the second count. That disposes of any question as to the validity of the sentence.

Then the next point is whether that verdict is warranted by the evidence. In our opinion it is. The facts are that the appellant, under a real or fancied grievance, had an altercation with a man named Hurt, and fetched a poker with which he violently assaulted him. Hurt shewed more fight than was expected, and the prosecutor, whose arm was in a sling, came with another poker and belaboured the appellant on the legs in order to rescue Hurt. The appellant admits calling for a knife, and undoubtedly blows were inflicted causing fourteen wounds on the face of the prosecutor. The appellant says that he called for a knife to cut a muffler which was choking him, and struck one or two blows with a ruler; he accounts for the cuts by saying they were caused by glass which was broken by the poker He was called before the magistrates, and never suggested this story; it is impossible to avoid the conclusion that it was an invention. His mother urged him on, and got the knife for him. He has a bad record; he has been thirty or forty times convicted, and for many acts of violence, and although for some period he conducted himself fairly well under the probation officer, having regard to his record and character in the past the sentence was not more than he deserved. The appeal must therefore be dismissed.

Verdict varied.

A. L. B. T.

EDWIN BRERETON.

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When a defendant is tried upon two indictments by the same jury, care should be taken in directing them that the latter charge is not affected by the former.

This was an appeal against conviction and sentence. Appellant was convicted of larceny, on the 6th April, 1914, at the Cheshire Sessions, holden at Knutsford, and was sentenced to two years' detention in a Borstal institution.

E. Owen Roberts for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant was convicted of stealing a motor bicycle, and the grounds of appeal are that the evidence does not disclose the crime of larceny, and that the summing up was inadequate. There was no charge of obtaining by false pretences. The bicycle was taken to the appellant's house by the son of the prosecutor as his father's agent, and delivered to the appellant; the evidence shews that it was a sale on credit; the lad asked for security, and was referred to the manager of the bank. If the goods were sold on credit the property passes, and no subsequent conversion can make it larceny. If the property does not pass, then the question arises whether there was any *animus furandi*. (He was stopped by the Court.)

Comyns Carr, for the Crown. The summing up, though very short, calls the attention of the jury to the only two material points in the case; it says: "If you believe the evidence the prosecutor did not intend to part with the bicycle except for ready money," and "Did the prisoner intend to take this bicycle from the owner's possession and convert it to his own use?" He had already stated in his first words that the taking must be felonious. He said that the prisoner produced "our old friend the empty cheque-book"; I think this must refer to another charge against the appellant, for which he had just been tried and acquitted before the same jury; that was a charge of obtaining money by false pretences by means of a cheque for £50.

The case turns on the extent of the agency of the son. If the seller's agent has no authority to part with the property except on terms, as only for ready money, and if the prisoner by a trick

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or by false pretences induces him to part with the property, it is larceny, certainly if the defendant knows of the agent's limited authority. See *Stewart*, 1 Cox C. C. 174 (1845); *Prince*, L. R. 1 C. C. R. 150; 38 L. J. M. C. 8; 19 L. T. 364; 17 W. R. 179; 11 Cox C. C. 193 (1868); and *Middleton*, L. R. 2 C. C. R. 38; 42 L. J. M. C. 73; 28 L. T. 777; 12 Cox C. C. 260, 417 (1873). The evidence shews that the son had not even ostensible authority to part with the bicycle, and that the appellant made false representations that he had an account at the bank, and that the chequebook was his.

Owen Roberts. It is the duty of the judge to explain to the jury the meaning of felonious intent; there was no such explanation here; the question should have been left to them whether there was any such intent: *Deering*, 11 Cox C. C. 298; 20 L. T. 680; 17 W. R. 807 (1869).

The sentence was excessive; nothing was known against the appellant, and I have a large number of testimonials speaking in his favour.

The LORD CHIEF JUSTICE: The appellant was convicted on a charge of larceny of a motor-cycle which was the property of one Cooke, and he was sentenced to detention for a maximum period of two years in a Borstal institution. It must be borne in mind, in considering this case, that the young man had been tried early in the day, before the same Chairman and the same jury, for obtaining a motor lorry by false pretences, namely, by representing himself as having an account at a bank on which a cheque for £50 was drawn. He was acquitted on that indictment, and then was put on his trial on the present charge. The facts are that having a motor lorry which was out of repair, he induced Cooke to repair it on credit, and the lorry was returned to him with a bill for £15. The appellant was unable to pay this sum, so it was arranged that the lorry should be taken back for the price of repairs. The appellant, on the other hand, said that he was purchasing the motor-cycle, and that part of the transaction was that Cooke was to allow £15 off the price out of the sum he received for the lorry. This was a question for the jury, and we must take it that they accepted Cooke's story

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that it was an independent transaction. The transaction for which the appellant was indicted arose out of the sale of the motor-cycle for £30. Cooke's son rode the cycle to the appellant's house and delivered it to him, but under instructions not to leave without the money. We are not surprised that the jury took the view they did, having regard to what had happened with reference to the lorry. It was not likely that Cooke would give the appellant credit for the cycle. At first it seemed to us that the son might have been a person with ostensible authority, but, on examination of the evidence, it is plain that the son told the appellant of the limitations imposed by his father upon him. That brings the case within *Stewart*, and disposes of the first point raised. If the son was induced to part with the property as well as the possession, and had no authority to part with the property except within limits, that is in exchange for immediate payment, the case is plain on the authorities that there was no parting with the property within the meaning of the law, so there is no difficulty in convicting the appellant of this offence, and finding that larceny was committed.

The second point taken is that the Chairman did not give a full and adequate direction, so as to bring the minds of the jury to bear on the real point they had to try. The summing up was short, and it may be none the worse for that, but it should tell the jury the real points upon which they had to find a verdict. The Chairman said: "Did the prisoner intend to take this bicycle from the owner's possession and convert it to his own use?" The jury may well have thought, on that direction, that if the appellant intended to obtain it lawfully, and then having so obtained it, converted it to his own use without paying for it, the offence was committed; that would be manifestly wrong. We think the direction was inadequate, and that it was essential that a proper and careful direction should be given when the prisoner had already been tried in the same Court, before the same judge, and by the same jury: it is obvious that there was a danger of the jury thinking that appellant was very lucky to have been acquitted the first time. He is entitled to be tried properly on each charge, and the minds of the jury should be directed to the essential points in the case. In our opinion the direction given in this case was not sufficient, and we cannot, viewing the summing up as a whole,

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feel satisfied that the jury would have convicted the appellant had they had a more careful direction, and, therefore, the conviction must be quashed.

Conviction quashed.

A. L. B. T.

THOMAS JAMES WHITMORE.

It is open to a jury to find that a trade name has been assumed with intent to defraud.

This was an appeal against conviction on points of law. Appellant was convicted of obtaining goods by false pretences, on the 9th April, 1914, at the Warwickshire Sessions, holden at Coventry, and was sentenced to four months' imprisonment with hard labour.

Doughty for the appellant, who was present. The prisoner was convicted of obtaining sacks of flour by false pretences, the false pretences alleged being that he had a good class business as a baker, and that his name was H. Beach. Before that trial he had been tried on another indictment for a similar charge, with the same false pretences, and the Chairman held that there was no evidence to go to the jury. My submission is that there was no evidence in this case of any false pretence having been made, and that even if it was made there was no evidence that it acted on the mind of the prosecutor so as to induce him to pass the property

The appellant's real name is Whitmore, but he had traded as Beach for nine months; no evidence was given that the use of this name instead of his own had any effect on the prosecutor's mind. No evidence was given that it was not a good class business, the whole case turned on the name. The appellant was an undischarged bankrupt, and his business was bought from the liquidator by his sister, who was a Mrs. Beach; she was in Canada, and the appellant carried on the business as her manager. At first an order was given for five sacks, and these were paid for; then a traveller called on the appellant and got an order for fifteen sacks, and it was in respect of this order that the charge was made.

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Inquiries were made by the prosecutor about Beach, and he was told that there was nothing against him. The appellant was, in fact, holding himself out as Beach, and if he had been sued in that name judgment could have been recovered against him. To take another name, even with intent to defraud, is not a false pretence, unless the name taken is of a well-known man, and suggests that the person using it is wealthy.

The summing up was unsatisfactory. Mistakes were made on the facts, and the Chairman said: "If he had been carrying on the business in his own name, and it had been known that he was an undischarged bankrupt, they would not have given him credit." No representation that he was not a bankrupt was made, and it was not one of the false pretences laid in the indictment. "It is for you to say whether he behaved honestly in this matter; it is the only point for you to take into consideration." This was a misdirection, and very prejudicial to the appellant, since the jury had heard the earlier charge. *Williamson*, 11 Cox C. C. 328; 21 L. T. 444 (1869), is authority that an untrue representation that the accused is doing a good business will not support a charge of obtaining money by false pretences. No direction was given to the jury that they must be satisfied that the prosecutor was induced by false pretences to part with the goods.

Bethell, for the Crown. Unless the appellant had represented himself as Beach the prosecutor would never have parted with the goods. The evidence shewed that the statement that he had got a very good business meant that he was the owner of the business, and not merely the manager. (He was stopped by the Court.)

LORD COLERIDGE J.: This case raises some rather nice questions of law. The appellant was convicted on an indictment charging him with obtaining goods by false pretences, namely, by pretending that his name was H. Beach, and that he owned and carried on at Coventry a good class of business as a baker. Business relations were commenced by a traveller calling on the appellant, who stated that his name was Beach, and said how he spelt it, and that he had a very good business, doing twelve sacks weekly. On that the prosecutor accepted the order, and the goods were delivered. No question arises in respect of this transaction, because

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the goods were paid for. Then, a small order having been first given, the prosecutor was encouraged to supply a larger order; those goods were not paid for, and it is in respect of them that the charge was made.

Was it a false pretence? Undoubtedly it was a false pretence of fact: the appellant's name is Whitmore, and he is an undischarged bankrupt. Everybody has a right to assume another name; he may take a business name and trade under it; therefore with the mere fact that he takes another name for the purposes of trade there is nothing to find fault. But if your name is Whitmore and not Beach, and you say it is Beach for the purpose of leading people to think that it is not Whitmore, it is a false statement of fact. The next question is, was it done with intent to defraud? It is clear that there was ample evidence on which the jury might find that the assumption of the name of Beach was done with intent to defraud, coupled with the assertion that he had a good business, which is negatived by his own statement. With regard to the second order some inquiries were made; these, as far as the business was concerned, were favourable, but one of the reasons which induced the prosecutor to part with his goods on the second occasion was the favourable report he received of Beach. The purchaser was not Beach at all, and there was clear evidence on which the jury could find that in delivering the property the prosecutor was induced by the original and continuing false pretence. In our opinion it was a false statement of fact, it was made with intent to defraud, and there was evidence that it had induced the prosecutor to part with the goods. In these circumstances there is no reason to quarrel with the finding of the jury, following a summing up which states the law quite clearly; the Chairman pointed out that it was not necessary for the appellant to disclose the fact that he was an undischarged bankrupt, and told the jury to consider the matter apart altogether from that question; a great part of the summing up was favourable to the defence. In our opinion the appeal must be dismissed.

Appeal dismissed.

Solicitors for the Appellant—*Philip Baker & Co.*, Birmingham.

A. L. B. T.

THOMAS HENRY CURNOCK.

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Proviso to s. 4 (1) of the Criminal Appeal Act applied in a case of misdirection.

This was an appeal against conviction by leave of Scrutton J. Appellant was convicted of feloniously receiving stolen property, at the Bristol City Sessions, on the 17th April, 1914, and was sentenced to fifteen months' imprisonment with hard labour.

E. Duke for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant was charged with another man, named Norman, with stealing and receiving some hose-pipe. Norman had tried to sell it while the appellant was standing by, and it was afterwards found in appellant's cellar. At the police-court Norman said, pointing to the appellant, "That is the man who brought the hose-pipe up from the cellar in Penn Street yesterday, and went with me to Brislington to try and sell it." The appellant said, "That is a lie." Evidence of this statement by Norman was given at the trial, and I submit it was altogether inadmissible, as it did not exculpate Norman, but only tended to inculpate the appellant. Even if admissible, it should not have been used against the appellant.

[The Lord Chief Justice: In *Christie* [above, p. 141], it was decided that evidence of a statement made in the presence of a prisoner is admissible, but is not evidence of the truth of the facts stated.]

No direction was given to the jury that they were not to take it as evidence of the truth of the facts. (He was stopped by the Court.)

Wethered, for the Crown. There has been no substantial miscarriage of justice. The appellant was found in possession of property which had been recently stolen, and so far from giving a reasonable explanation of his possession, he made three contradictory statements on the subject. On this the jury could properly convict him. *Langmead,* L. & C. 427; 10 L. T. 350; 9 Cox C. C. 464 (1864).

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Duke. The Recorder told the jury they could act on Norman's statement; this was so substantial a misdirection as to be the dominating feature of the summing up; the Court, therefore, should not speculate on what the verdict might have been.

The LORD CHIEF JUSTICE: The appellant was convicted on an indictment charging him with feloniously receiving a hose-pipe; he was tried with another prisoner, Norman, who does not appeal. The appellant's appeal is based on misreception of evidence and misdirection. Norman made statements which Mr. Duke says were not admissible or, if admissible, were only evidence against Norman, and not against the appellant, and that the Recorder ought to have directed the jury that the statement was not evidence against the appellant. We agree with one part of the argument, that it was for the Recorder to direct the jury that, although the statement was admissible in evidence, and in strict law admissible against the appellant, they ought to be careful to discriminate between evidence of a statement by Norman and evidence of the facts stated by him. He ought to have told the jury to be careful not to accept the statement made as evidence of the facts stated by Norman. That is important, but under the proviso to s. 4 of the Criminal Appeal Act, if we are satisfied, notwithstanding the failure to direct as above, that there has been no substantial miscarriage of justice, the conviction should stand. Applying that proviso to this case, we have to see whether there was any evidence of a reasonable explanation by the appellant of being in possession of property which had been recently stolen. The judgment of Blackburn J. in *Langmead*, which has always been acted on as the leading authority, was quoted to us. In that case it was decided that the burden of giving a reasonable explanation was on the appellant. At first he said he knew nothing about the hose-pipe; the next day he said he found it by the Feeder Bridge, and at the trial he said he picked it up at Brislington, which, according to the evidence, is a long way from Feeder Bridge. These were three contradictory explanations, and it cannot be said, in view of this, that the appellant gave any reasonable explanation of how he came to be in possession of the stolen goods. Having considered the facts and these three explanations, we cannot think that, if the jury had had a proper direction, and had been told to disregard the statements of Norman as evidence of the facts stated,

they would have come to any other conclusion than that to which they did come. The appeal must, therefore, be dismissed.

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Appeal dismissed.

A. L. B. T.

MARTIN NEARY.

The Court will rectify a sentence inadvertently passed.

This was an appeal against sentence by leave of Scrutton J. The appellant was convicted of attempted shopbreaking, at the Grimsby Borough Sessions, on the 21st April, 1914, and was sentenced to three years' penal servitude.

Appellant, who was not present, was not represented by counsel.

E. P. Thursfield, for the Crown. Although the evidence seemed to point to the offence of shopbreaking having been committed, the appellant was only indicted for the attempt. He pleaded guilty, and, no one noticing that he was only charged with the attempt, he was sentenced for the full offence. The Recorder discovered the mistake on the following day, and at once took steps to have an appeal put in motion.

The LORD CHIEF JUSTICE: It is clear that in this case a slip was made in the sentence, which the Recorder discovered, and to which next day he called attention, so that the appellant might bring the matter before this Court. The sentence passed cannot stand, as it is not a competent sentence for an attempted shopbreaking. In our view the proper sentence is eighteen months' imprisonment with hard labour.

Sentence reduced.

A. L. B. T.

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ALBERTO OLIVEIRO COELHO.

The Court in its discretion will read a doctor's report of the mental state of an appellant founded on an examination made before, but drawn up after, the date of the act charged, and not put in at the trial.

It is not a good defence that defendant, though he can distinguish between right and wrong, is so affected by disease that he is incapable of controlling his actions.

This was an application for leave to appeal against conviction, but was heard as a final appeal. Appellant was convicted on the 24th April, 1914, at Liverpool Assizes, before Bray J., of the wilful murder of his wife, and was sentenced to death.

Rigby Swift, K.C. (with him *J. E. Singleton*), for the appellant, who was not present. The appellant was convicted of the murder of his wife, which took place on a British ship, the *Deseado*, on the high seas, about 170 miles west of Madeira. The defence was insanity at the time the act was committed. I say that the verdict of guilty ought to be set aside in accordance with the Criminal Appeal Act, 1907, s. 5 (4), and a special verdict substituted under the Trial of Lunatics Act, 1883. We also complain of misdirection on the part of the learned judge.

The appellant's age is thirty-two, he speaks no English, and until his trial had never been in England, being Portuguese by birth. He went to Rio de Janeiro at the age of ten, and worked as a confectioner. He lived there for some time with the woman who afterwards became his wife. At one time she left him, and he followed her to Lisbon; she ultimately returned, but left him a second time on the 15th October, 1913, and came to Portugal. He followed her, and they were married in Portugal, and sailed for Rio on the 5th February. He was passionately fond of this woman.

Shortly after the marriage and before they left Portugal, there was evidence that the prisoner complained of inconsiderate conduct on the part of his wife.

On the 7th February, Mrs. Coelho was sitting in the social room in the steamer, when the prisoner came in with a man named Gomez. They all three talked quietly. The prisoner and Gomez soon walked out, but shortly afterwards returned,

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when the prisoner, taking out a pistol, shot his wife twice at a distance of one and a half yards.

The crime was committed without any motive and without possibility of escape for the prisoner. He was put in irons and taken to Rio, being under the care of a Spanish doctor on the ship. The defence knew nothing of this doctor before the trial At Rio the prisoner was kept for over a month in charge of two doctors; they certified that he was suffering from "incipient general paralysis of the insane."

At the age of twelve the prisoner underwent an operation for a disease of the ear. At the age of sixteen he contracted syphilis, and again at twenty-four. He never seems to have recovered from this, though he spent six months in hospital.

About twelve months ago his brother said he became peculiar, and added, "he did not seem to have any peace at all."

His conduct in Portugal was most extraordinary. He was suffering from the impression that he was going to die, and used to shout at nights. He thought that by getting up he could stave off death. He also gave away his jewellery, asking people to keep it as a souvenir.

The doctors' reports from Rio, particularly that of Dr. Roxo, shew that the appellant was suffering from loss of memory, and that he also had traces of syphilis, with spermatorrhœa, insomnia, loss of memory, and want of concentration. They described this as a case of "syphilitic neurasthenia."

Dr. Seagar, who brought the appellant home, said he was suffering from moroseness.

I was unable to read to the jury a report made by Dr. Mesquita, a Portuguese doctor, as he was not present at the trial. The examination on which the report was made took place at Oporto after the marriage and before the tragedy occurred.

[The LORD CHIEF JUSTICE: We will allow you to read the report.]

Dr. Mesquita said: "I was consulted about the state of health of the prisoner: he thought he was being poisoned by his wife . . . . saying he saw his veins reddening, and took this to be the approach of his end" afterwards he wrote that the appellant

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was an "irresponsible individual," having committed crime "impelled by his delirious ideas."

Dr. Griffiths, medical officer of Walton gaol, was called on behalf of the defence. He kept the appellant under observation to see if he was fit to plead, he said he was still suffering from the delusion that his wife had been putting something into his food: he had no recollection whatever of the crime. Of course, it was impossible for Dr. Griffiths to say with absolute certainty as to the appellant's state of mind more than two months previously.

Dr. Warrington, who was also called, expressed the opinion that the prisoner was not responsible for his actions, although Bray J. ruled out the question of control. I tried to put the question, whether a man suffering from syphilitic neurasthenia or any other sort of neurasthenia, who suffers from insomnia and delusions, and then finds he has forgotten all about the crime, is responsible for his actions? Nor would he allow another question, but asked the witness himself instead, "Do you think he knows the difference between right and wrong?" to which the witness answered, "I should say that he could not fully appreciate the difference."

I submit that even if a man can distinguish between right and wrong, he may not be able to control his actions.

[LORD COLERIDGE J.: Uncontrollable temper?]

My submission only applies to inability to control impulses owing to disease of the mind, a state recognised by medical experts as rendering a man irresponsible for his actions.

[The LORD CHIEF JUSTICE: A rather curious doctrine that in such a case a special verdict should be returned.]

[LORD COLERIDGE J.: Does it not come to this, that the doctor's opinion was largely influenced by the man's delusions?]

I understand the medical view to be that if a man, for example, has a delusion that the earth is flat his mind is so affected as to

render him irresponsible, and he is incapable of distinguishing between right and wrong in other matters.

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[The LORD CHIEF JUSTICE: The question then is what verdict should the jury have returned if they had the whole of this evidence under their consideration.]

In *MacNaughten,* 10 Cl. & Fin. 200; 1 C. & K. 130, note (1843), the prisoner was labouring under such a defect of the mind that he did not know that he was doing wrong. A further question is whether a man is affected by a disease affecting his mind in such a way as to be unable to control his act. In *Oxford,* 9 Car. & P. 546 (1840), Lord Denman C. J. said: "If some controlling disease was, in truth, the acting power within him which he could not resist, then he will not be responsible." He also said, on p. 547, "The question is whether the prisoner was labouring under that species of insanity which satisfies you that he was quite unaware of the nature, character, and consequences of the act he was committing, or, in other words, whether he was under the influence of a diseased mind and was really unconscious at the time he was committing the act that it was a crime." In *Duncan* (between 1884 and 1896), Lawrence J. "added as an alternative to the usual charge the question, 'Was the prisoner unable to control his actions in consequence of a disordered mind?' ": Wood-Renton on Lunacy, p. 902.

I submit that the jury's attention should have been directed to the question: Had this man such a diseased mind that even if he knew the difference between right and wrong he was unable to control his own actions? This is a deed committed without motive, in broad daylight and with someone close by.

[The LORD CHIEF JUSTICE: There is no evidence of loss of control here, except such as you may infer. Therefore, the one question involved is whether when he did the act he was insane at the time.]

I should have thought that it would have been right to direct the jury to the questions which Sir James Stephen sets forth in his Digest of the Criminal Law, Art. 28: see also his History, Vol. II., pp. 155—159. Even if the question that I wanted

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was not put, the summing up was deficient, for there is not a word in the summing up to say what is meant by discriminating between right and wrong. I submit that the summing up should have given some such direction as to distinguishing between right and wrong as is set out in the answers to the second and third questions in *Macnaghten:* it should have contained some such direction as that of Stephen J. in *Davis*, 14 Cox C. C. 564 (1881), where he said: "As I understand the law, any disease which so disturbs the mind that you cannot think calmly and rationally of all the different reasons to which we refer in considering the rightness or wrongness of an action—any disease which so disturbs the mind that you cannot perform that duty with some moderate degree of calmness and reason may be fairly said to prevent a man from knowing that what he did was wrong."

This sentence—"of course, his family would never have allowed him to marry if insane, and would have desired to prevent it"—ought not to have been put before the jury, especially when, as a matter of fact, there was a medical certificate to the effect that he was suffering from delirious ideas. The learned judge represented the facts quite innocently as different from what they really were. The judge also did not point out to the jury the complete absence of motive. One of the signs of insanity is an act of this kind without any motive.

Bray J. never said a word to the jury about the delusion which Dr. Griffiths spoke of, namely, that the man's wife was trying to poison him. He also says that there is only the prisoner himself on whom to rely as to the loss of memory: surely it would be very wrong to reject evidence on this ground.

[THE LORD CHIEF JUSTICE: The circumstances must, for this reason, be sifted very carefully.]

This is a case where the jury ought to have come to a different conclusion. I have now a new piece of evidence, and on this the jury could not properly have found the verdict they did.

A. H. Maxwell (with him *R. E. Gething*), for the Crown. There is ample evidence to sustain the verdict in this case. Dr. Seagar said that there were no grounds whatever for saying that the prisoner was suffering from general mental paralysis

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of the insane, and that he was quite fit to travel to England from Brazil, and his opinion was subsequently verified by the appellant's improvement in health during the voyage.

[The LORD CHIEF JUSTICE: Can you tell the Court why Bray J. admitted the certificates of the Brazilian doctors, but not the report of Dr. Mesquita?]

As regards the report of Dr. Mesquita, I had never seen this report until Mr. Swift produced it in Court, and we know nothing about it.

Bray J. thought that as Dr. Mesquita's report was obtained after appellant had arrived in this country, and as there was no information how it was obtained, and in addition it was very ambiguous in its terms, it was in a different category to that of the other certificates. (He was stopped by the Court.)

The LORD CHIEF JUSTICE: The appellant was convicted of the murder of his wife, and he appeals against his conviction on two grounds of law; the first, that on the evidence before the jury they were bound in reason to come to the conclusion that, although the appellant was guilty of the act of shooting his wife, he was not sane at the time; and the second, that to the questions put to the jury by the judge another ought to have been added. In our opinion the determination of this case must depend on the view we take of the evidence. We are not intending to lay down that the Court would not interfere and substitute a special verdict under the Trial of Lunatics Act if it thought it right and just. On examination of the evidence we cannot come to the conclusion, sitting as a court of law, and exercising the powers and functions conferred on this Court by the statute of 1907, and dealing with the verdict of the jury as one given after a proper direction, that that verdict was wrong. The only alternative to quashing the conviction is the substitution of a special verdict, and the consequent order for the detention of the appellant.

The facts, as far as they are material, are as follows: the appellant when he was ten years old left Portugal and went to Rio de Janeiro; he suffered from deafness, and had an operation to his ears at the age of twelve. At the age of sixteen he contracted syphilis in a virulent form, and again when he was

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twenty-four. He then went to Lisbon, and was treated for this disease for six months in the hospital, and then returned to Brazil apparently very little the better for the cure; he seems to have successfully carried on a confectionery business there. Shortly before the events in question he became acquainted with the deceased, and had relations with her. She left for Portugal on the 15th October, 1913, and on the 5th December he followed her, being consumed with an intense passion for her. He married her, and they lived in his brother-in-law's house until the 5th February, 1914, when they left in a British ship belonging to the Royal Mail Steam Packet Company. On the 7th February he entered, at twenty minutes past twelve, what was known as the social saloon, where his wife was seated quietly waiting for the band to play; three members of the band were present and nobody else. The appellant came into the saloon with a man named Gomez, of whom we know nothing; there was a conversation between the appellant and his wife in Portuguese. It was not understood by the persons present, and it is even doubtful if they heard it beyond being aware that the two persons were talking. The interview was a perfectly quiet one, and there were neither circumstances suggesting a quarrel, nor was there any agitation on the part of the wife. After a short discussion the appellant and Gomez left, but returned shortly afterwards, when the appellant pointed a pistol at his wife's left breast at a distance of one and a half yards and discharged it, then shooting her a second time through the heart. He was arrested and kept in irons until the vessel reached Rio, where he was left until the vessel returned; he was then taken on board again and brought to this country, where he was charged.

On these facts, which so far are undisputed, there is no doubt that there is *primâ facie* evidence that the appellant was guilty of wilful murder. The defence set up was that at the time he was mentally so diseased that he did not appreciate the difference between right and wrong, nor that he was doing wrong in committing the acts in question. There was some argument on the law, but it is unnecessary to go fully into it. We are of opinion that the direction given by the judge to the jury was correct. He told the jury that a man was presumed to be sane unless the contrary was proved to their satisfaction; he went on to say that it was for the defence to establish that the appellant was not sane

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at the time of committing the acts, and dealt with the facts in the case. In our view no fault can be found with the direction or with the trial; indeed, counsel for the Crown, with the consent of the judge, allowed a document to be put in which the defence could not have read had the law been strictly enforced, and which was much relied on by the defence. This was a certificate of a Dr. Roxo, which was dealt with by the judge as if it had been properly proved. The evidence on which the matter turns is mainly the reports of two doctors, and Dr. Roxo, in particular, has, according to the evidence before us, great qualifications and a high reputation; they said that in their view the appellant was suffering from syphilis, with loss of memory, insomnia, spermatorrhœa, and lack of mental concentration; they describe it as syphilitic neurasthenia. This evidence was all before the jury, and also the evidence of Dr. Griffiths, the medical officer of Walton Gaol. He is of opinion that the appellant is really suffering from the delusion that his food had been poisoned by his wife by inserting some discharge, which would not only cause him great disgust, but would also poison the food. Dr. Griffiths came to the conclusion that it was a very difficult case. He thought that the appellant understood his serious position, that he was sane and fit to plead; but he does say that he thought from the reports of the doctors at Rio and the evidence that the condition of his mind at the time of the offence was extremely doubtful. Dr. Warrington, who has made a special study of the brain, also gave evidence, and his evidence is much relied on by Mr. Rigby Swift. His opinion was that the man could not distinguish between right and wrong, and that the delusions interfered with his mental activity. It must be borne in mind that it is for the defence to establish the appellant's insanity; the jury formed a different view, and found him guilty of murder.

In argument we have had the advantage of another piece of evidence; we have admitted a certificate of Dr. Mesquita dated in April, 1914, because, although it was not proved at the trial, we thought it right to see what light it could throw on this difficult case. On examination of this certificate, and on consideration, we are clearly of opinion that it would be very dangerous for this Court to accept it as proof of the facts therein stated without further inquiry and additional information. It does not say on what date the examination

of the appellant was made, nor in what circumstances it was given. It must have been sent to this country under instructions from the appellant or his friends, and must have been accompanied by a covering letter. It is most meagre, and in the circumstances we should not be justified in acting on it. We have taken into account all the other facts, the appellant's life in Oporto, his having given away jewellery, the statement of his brother that he thought he was half mad, and all the other material matters.

Although we have come to the conclusion that this appeal cannot succeed, we do so with much hesitation, and think that it is a difficult case, and this was also the view of Dr. Griffiths and, we may add, of the judge who so carefully tried the case. It has not been sufficiently established that the appellant was insane at the time of committing the act to justify us in disturbing the verdict of the jury, but it must be borne in mind that powers are vested in the Home Secretary in advising His Majesty with regard to the prerogative of mercy which are not available to us. This Court would not presume to interfere in any way with the advice the Secretary of State may think fit to give to His Majesty as to the exercise of that prerogative, but we do think that this is one of those cases where the powers of the Home Office may be very usefully employed if he thought it right to set them in motion. The Home Secretary can have examinations made and can get reports, and has far fuller opportunities of arriving at a satisfactory result than we have.

Appeal dismissed.

Solicitors for the Appellant—*Herbert J. Davis & Co.*, Liverpool.

S. W.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE COLERIDGE AND MR. JUSTICE SANKEY.

JOHN CARTWRIGHT.

It is improper to identify a defendant only when he is in the dock.
Sentence mitigated in view of evidence (unknown to the Court of trial) that appellant had tried to earn an honest living.

This was an appeal against conviction and sentence, by leave of the full Court. Appellant was convicted, on the 7th April, 1914, at the Warwick County Sessions, of housebreaking, and was sentenced to five years' penal servitude.

H. W. Disney for the appellant (under s. 10 of the Criminal Appeal Act), who was present. Appellant was convicted of breaking into a house on the evening of December 22nd, 1913, at Solihull, near Birmingham, and with stealing various articles.

A police-constable said he saw a woman loitering suspiciously near this house, and that a man came out of the house and joined her. The constable chased the man, who climbed over a hedge of rose-bushes, dropping his hat, and escaped. In following him the constable's face was badly scratched. At 7.15, a quarter of an hour later, a man with blood on his face called at a neighbouring house, saying that he had had a bicycle accident, and asking to borrow a hat. He gave his address as Great Barr Street, where the appellant happens to live. Subsequently the prisoner was arrested on 24th December in his own house, and was said to have the scratches on his face. On the 6th January he was charged before the magistrates. Three witnesses, in addition to the constable who had chased the man who escaped, were called to identify the prisoner. Each of the three swore to having seen the prisoner at Solihull on the night of 22nd December, and never to have seen

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him before or since till he entered the dock. The prisoner was not put with other men for the purpose of identification. He entered the dock and a witness was asked, "Is that the man?" the answer was, "Yes." One of the three witnesses said that on the 22nd the prisoner's face was scratched. I contend that the mode of identification in this case was improper; three of the witnesses never really identified the man, they only saw him in the dock. Lord Alverstone C. J. said, in *Williams*, 8 Cr. App. R. 84 (1912): "The case for the prosecution at the trial evidently rested on the identification by Fulcher; this identification was not properly carried out; Fulcher saw the appellant alone in the police-station, and did not pick him out from among other men." In *Chapman*, 7 Cr. App. R. 53; 28 T. L. R. 81: C. C. A. (1911), Lord Alverstone C. J. said: "The police-sergeant asked, 'Is that the man?' That is not a satisfactory way of identification." This matter was not brought before the jury as it should have been.

As to the scratches on prisoner's face, there was a direct conflict of evidence. Detective Whitehouse said that he had scratches on him on December 25th, but Dr. Tibbits, medical officer to the county gaol, who was called at the prisoner's request, said that when he examined him on December 26th he saw no scratches upon him, and added, "It is my business to take notice of such things."

The Chairman made a very improper statement about Whitehouse in his summing up, saying that he had known him for many years, and that he was quite certain he would not have said there were marks on the man's face if there were not. The Chairman ought not to have made such remarks; there was a conflict of evidence, and this would influence the jury.

[The LORD CHIEF JUSTICE: We have to look at the whole of the evidence in the case. If the evidence is correct the appellant knew what he was wanted for.]

There was evidence of footprints with rubber heels on them, but this does not amount to much, and the man's *alibi* seems very complete.

As to the sentence, it is a very severe one, and Mr. Willes, who was present at the former trial, knows that the appellant was

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making an effort to get work. He was just married, and had a child, he was trying to get a home together. The chaplain to the prison where the appellant had served a former sentence had been unsuccessfully trying to get him work at his own request. The appellant found it very hard to get any offer of work after having been in prison.

[The LORD CHIEF JUSTICE: When did he come out of prison ?]

In November, 1913; he had been sentenced for three years.

[LORD COLERIDGE J.: He ought to have been released in May if he had earned remission by his conduct.]

R. A. Willes, for the Crown, was not called upon.

The LORD CHIEF JUSTICE: The appellant was convicted of housebreaking and larceny, and it has been contended by Mr. Disney that the conviction should be set aside or the sentence reduced. He has addressed us upon the question of identity.

A house was broken into, and there was a theft at the same time. We have the evidence of Police-Constable Cart, who watched the thief on that evening, and identified the appellant as the man he saw coming out of the house, and we have also the evidence of the servant Gosling, who opened the door at Mr. Arter's house where a man came to ask for a hat. There is this observation, that the prisoner was not put with a number of other men so that a witness might be able to identify this man as the guilty man. It would have been infinitely better had this been done. Two cases were cited to us on the subject, but the case does not depend entirely on this evidence. The evidence in this case is of a cumulative character. There is the evidence of the footprints which were closely examined and corresponded exactly with the boots which the prisoner was wearing. Then there is a conversation about the scratches; Whitehouse said that the prisoner on being asked to account for them, said that he got them fighting, but would not say with whom. The prisoner also made an effort to escape when he saw Detective Baldock and Mr. Arter; why should he have done this if he were an innocent man ?

Lastly, although there was the statement which the Chairman

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made in his summing up about Whitehouse, "I have known Whitehouse for a number of years, and am quite sure he would not have said there were marks on the man's face if there were not," we do not think that is sufficient ground for interfering with the verdict, and the appeal as to that must be dismissed. Perhaps the Chairman ought not to have given such a testimonial to the credibility of the witness.

With regard to the sentence, the man undoubtedly has a bad record: in February, 1911, he was sentenced to two concurrent terms of three years' imprisonment; he has been in a Borstal institution, and his age now is only twenty-six. This Court does not interfere unless further facts are brought to our notice. In view of the further facts brought to our notice in the case, however, we would sooner err on the side of mercy and reduce the sentence to one of three years' penal servitude.

Sentence reduced.

S. W.

ROBERT NORMAN BURNELL.

In a summing up, care should be taken not to use expressions suggesting that defendant had been previously convicted (where there is no evidence to that effect).

Proviso to s. 4 (1) *of the Criminal Appeal Act applied.*

This was an appeal against conviction and sentence, by leave of Scrutton J. Appellant was convicted, on the 8th April, 1914, at the West Kent Sessions, of obtaining money by false pretences, and was sentenced to fifteen months' imprisonment in the second division.

George Elliott, K.C. (with him *R. Fanthorpe*) for the appellant, who was present. Appellant was charged with obtaining two cheques by false pretences. He had been an estate agent and property dealer at Penge, and carried on business under the name of Mortimer and Burnell. As a property dealer he made offers to persons anxious or willing to dispose of houses or land,

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and then tried to obtain a higher offer from someone else. In this way he offered some property belonging to a Mrs. Cryer without any leave from the owner, and obtained these two cheques for £24 and £23 respectively. The property consisted of two houses in Angers Road, Penge. Mr. Cryer had it advertised in the paper in November, 1913, and in a few days received an offer from the appellant. Cryer asked for £300, Burnell offered less; Cryer then asked £263, but an agreement was not arrived at. Finally, on January 20th, Cryer offered to accept £253, and in his letter disclosed his anxiety to get money, hence Burnell thought himself justified in prolonging the negotiations. The appellant was speculating on the prospect that Cryer would offer the property at a still lower figure, and he advertised it as being in the hands of his firm. He accepted an offer, made by a certain Chapman, of £240, subject to a deposit of £24, and also an offer by Smith for £230, with a £23 deposit. He dealt with both these gentlemen in case one should not complete.

Mr. Cryer did not make any lower offer. If Burnell had been a man of financial stability he would only have been liable in damages.

Subsequently both Chapman and Smith stopped these cheques which they had given by way of deposit.

The charge is that Burnell obtained these cheques by fraud, representing himself as Cryer's agent; his answer is: "I never represented myself as Cryer's agent."

Evidence was given by members of two respectable firms of solicitors who had helped to carry out similar transactions for the appellant.

[THE LORD CHIEF JUSTICE: On the evidence of this case and other transactions could it be said that there was not sufficient evidence for a jury to come to that conclusion?]

I do not propose to deal with that point; I propose to deal with the Chairman's summing up; he said as follows: "This is a case where it is necessary to look at similar transactions. You will, of course, remember that no earlier convictions are brought up until a man has pleaded guilty or you have returned your verdict." The point was whether the defendant was a person likely to have an intent to defraud. The Chairman no doubt was trying to

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explain to the jury the meaning of "system," but he chose a singularly unfortunate way of doing it; by using the second sentence on the top of the first, he made the jury think, "here is a man who has evidently been at the game before."

[The LORD CHIEF JUSTICE: The question is whether by the use of this language the Chairman has suggested to the jury that this man has been previously convicted; if he had left out the use of the word "convictions" there would have been nothing to complain of.]

The jury must have known that the whole question here was fraudulent intent, and I cannot imagine a more unfortunate thing than to speak of previous convictions.

Upon the summing up it is impossible to say that this man had a fair trial, and it makes it all the worse that there was some evidence of similar transactions.

[LORD COLERIDGE J.: We have to apply s. 4, sub-s. (1) of the Criminal Appeal Act. You say this verdict should be upset on the ground of miscarriage of justice, it is not so much a question of a casual remark on the part of the Chairman. The question is whether the jury would have come to the same conclusion apart from this casual slip.]

The jury always pull themselves together when the judge or chairman are summing up. Such a remark might be anything but casual, as far as the importance which the jury may attach to it, is concerned. You cannot tell how much the jury may have been influenced by the words "previous convictions."

The sentence was excessive; the appellant had been in business at the same office since 1902, and evidence was given that he carried on a genuine business there; on the other hand, the prosecution shewed that there were six or seven cases in which he had retained deposits. His age is thirty-one, and he has never been convicted before. The Chairman at first sentenced him to twelve months' imprisonment with hard labour, and then altered it to fifteen months' in the second division.

C. M. Pitman, for the Crown, was not called upon.

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The LORD CHIEF JUSTICE: The appellant was convicted on indictment of obtaining a banker's cheque of the value of £24 by false pretences with intent to defraud, and on a second count with attempting to obtain a cheque for £23 by false pretences with intent to defraud. His appeal is based on two sentences which were used by the Chairman in his summing up, and the facts may be shortly stated. The appellant was in business as an estate agent, and was in negotiation for the sale of a property, but the vendor could not come to terms. Some attempt was made by the appellant to sell the property by means of advertising, and then comes the critical period. On the 20th January the owner wrote that he would accept £253 for an early settlement, this being a reduction on the £300 which he originally asked. Then through advertisements the appellant got into communication with Chapman and Smith, and there is abundant evidence that the appellant was holding himself out as an agent authorised to sell the property at the price which he was asking, namely, £240, subject to a deposit of £24, in the one case, and £230, subject to a deposit of £23 in the other. In neither case had he authority to offer the property at that price, and the jury were properly directed that they must come to a conclusion whether the representations were made, and whether he obtained, or attempted to obtain, the cheques by fraud. At the trial evidence was given of other transactions of a similar character on the well-known principle which was dealt with by the Court recently (*Boyle and Merchant*, above, p. 180). The admissibility of this evidence has not been attacked by Mr. Elliott, but the Chairman in his summing up made use of an expression which was undoubtedly very unfortunate; he said, "You will remember that no earlier convictions are brought up until a man has pleaded guilty or you have returned your verdict." There is not the faintest doubt that what the Chairman meant was that, although the jury should look at the previous transactions, they should not regard them in the same way as they would regard convictions, but it is argued that it was calculated to suggest that the appellant had been previously convicted of similar offences, although the law would not allow evidence of the fact to be given. There is considerable force in Mr. Elliott's argument, but we have to consider how the expression bears on the whole case, and to apply s. 4 (1) of the Criminal Appeal Act, and decide whether, even if we are of opinion that

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the point raised might be decided in favour of the appellant, a substantial miscarriage of justice has occurred. The Court is of opinion that if the Chairman had never used the expression which has been criticised the result would have been the same, and that on the evidence before them the jury would have come to the same conclusion. If we were in any doubt on the matter we might feel compelled to set aside the conviction; but in the circumstances the appeal must be dismissed.

On the question of sentence all that it is necessary to say is that we think it should be twelve months in the second division, and not fifteen months.

Sentence reduced.

Solicitors for the Appellant—*Johnson, Ashton and Spice.*

S. W.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE COLERIDGE AND MR. JUSTICE SANKEY.

JOHN FLOOD.

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The Court disapproves of a "compromise" verdict.

This was an appeal against conviction and sentence, by leave of the full Court. Appellant was convicted of a common assault, at the Southampton County Sessions, on the 8th April, 1914, and was sentenced to twelve months' imprisonment with hard labour.

E. H. S. Bligh for the appellant, who was present. The indictment on which the appellant was tried contained four counts, charging assault with intent to ravish, indecent assault, assault causing actual bodily harm, and common assault. The assault took place on the 17th February, 1914, and the defence put forward at the trial was mistaken identity and an *alibi*. There was general surprise when the jury by their verdict found the appellant guilty of common assault. I submit that the verdict cannot be supported upon the evidence, that it is unreasonable having regard to the undisputed evidence of the nature of the assault, and that there was misdirection. The verdict shews unmistakeable signs of compromise on the part of the jury, though the bench passed the maximum sentence. The jury, no doubt, were in a hurry; they had had no food from breakfast until four o'clock.

The assault took place in a lonely country road, with high banks on each side, and was committed by a man dressed in running clothes. The prosecutrix, Mrs. Cowan, is a schoolmistress at Kingsley; she was on her way home to Binstead, about two miles and a half distant, and the place on the road where the assault took place was about three and a quarter miles from the prisoner's barracks.

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As to the question of identification, the whole garrison of three thousand five hundred men were paraded, and the prisoner was picked out, but Mrs. Cowan, before she picked him, had given a different description to the police, which stated that the prisoner's age was about twenty-five; he is nineteen; that he had a fierce-looking ginger moustache, and hair neatly parted down the centre. This is not the description of the man in the dock. The prosecutrix said that it was "not much good looking at the others"; she really picked the appellant out of about a hundred men. The witness Woodborne failed at first to pick out the prisoner; he only did so during a second parade of about a dozen men in running clothes, and when the men had no caps. He said that when he saw the man running past him on the afternoon of the assault, he noticed his moustache. I suggest that when he picked out the appellant during the second parade he had heard that Mrs. Cowan had picked out a man without any moustache. The witness Spier was not at the first parade, but picked out appellant at the second, I suggest, with some hesitation. (He was stopped by the Court.)

[The LORD CHIEF JUSTICE: How does the prosecution get over the fact that the prisoner had not a ginger moustache, and what is a reasonable explanation of this extraordinary misdescription?]

C. L. Chute, for the Crown. The witnesses for the prosecution persisted at the trial that the moustache had been shaved off. Although the mistake is an extraordinary one, all the other evidence is very strong, and the man has a very pronounced upper lip. Moreover, this man corresponded with regard to his movements in every respect. He went out in running clothes on the afternoon in question; he was left behind. He said he had lost his way on the common, and it was consistent that he should have gone down this road. Also, at the trial, he told a story of kicking about a football; but none of the men on the football ground remembered it, though he said he was there for an hour and a half. There comes a point where coincidence becomes certainty, for the appellant's story is eminently capable of corroboration.

[The LORD CHIEF JUSTICE: How do you account for the jury only finding evidence of a common assault?]

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The appellant did not lift the prosecutrix's skirt; it was a tight one; he tried to lift it.

[LORD COLERIDGE J.: Will you deal with the *alibi?* We understand that the lady identified the time and also spoke of a particular train passing. If this was so, and the man got back to the barracks at 4.50 p.m., he must have run three miles in about twelve minutes.]

The assault was after the time of the train, which was 4.25; it took place about 4.30. Hutton saw the lady about 4.40, and the assault must have been over by 4.35. The prisoner came in about 5 o'clock. McBean for the defence said that he started for the gymnasium before he met the prisoner, not later than 4.50. Ingram also said it was about 4.50 when he left the barracks. Johnson said that he saw the prisoner about 5 o'clock. I submit that the times do not disprove the story. It is really a question of the man covering a little over three miles in twenty-five minutes.

LORD COLERIDGE J.: The appellant appeals against both the conviction for common assault and also against the sentence. The question of conviction has been first dealt with. The story of the prosecution that an assault had taken place is unassailed; the assault, moreover, was one causing actual bodily harm, if not also an indecent assault. The prosecutrix was alone, and no one was by. She had never seen the man before; she gave, however, a description of him to the police, which description is quite irreconcilable with the man charged with the offence. She said that he had a "fierce-looking ginger moustache." Woodborne also gave a description to the police about the man's moustache, saying that he saw it as the man ran past him. It is admitted that the appellant never had a moustache; it is also admitted that he was seven weeks in prison awaiting his trial, and during all that time no hair grew on his face.

It is said that mistake arose through the light being bad. In the dark you may overlook something that is there, but darkness does not enable you to see what is not there.

The prisoner was identified by the prosecutrix and others out of a great number of men. The witness Spier also identified

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him out of twelve men. The man who committed the offence must have had some resemblance to the appellant; but this man undoubtedly never had a moustache.

Quite apart from the *alibi*, this conviction must have raised serious doubts. A jury must be sure beyond reasonable doubt, and they ought to be unanimous and clear in their belief in the identity of the man charged, before convicting; a compromise verdict is a very undesirable thing in any circumstances. In a criminal case involving the liberty of the subject it is not only undesirable, it is wrong. The verdict was quite out of keeping with the facts proved, and must have been a compromise verdict. The jury must have really doubted whether the case was made out.

In these circumstances, the question of identity being challenged on good grounds and open to error, we must quash this conviction.

Conviction quashed.

Solicitor for the Appellant—*Theophilus Brown, Winchester.*

S. W.

FREDERICK SIMON GROSVENOR.

The Court, though refusing an application to call further evidence, may, at its discretion, give leave on the appeal.

This was an application for leave to appeal against conviction, and for leave to call further evidence. Appellant was convicted of obtaining money by false pretences, at the Central Criminal Court, on the 5th May, before the Common Serjeant; the sentence was postponed.

Ernest Wild, K.C., and *J. P. Valetta* for the appellant, who was not present.

The Court gave leave to appeal on the grounds stated without calling upon counsel.

The grounds stated were (1) misdirection by the Common Serjeant in not sufficiently explaining to the jury the difference

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between false pretences and conspiracy; (2) the acceptance of a general verdict of guilty instead of a specific one, whether the defendant was guilty of false pretences or conspiracy.

Wild. I ask that the question of calling further evidence may be left open to me on appeal. Bennett, a co-defendant of the appellant's, was twice tried, the jury having disagreed both times. I wish to call evidence which was not available when appellant was tried, namely, to call witnesses to produce the books which were stolen from the custody of the appellant's clerk, and also for leave to call a witness to produce books, and also to prove entries in books belonging to Grosvenor's bank, the books being now in the custody of the police.

The point is, that Bennett went into the witness-box, and his case was that Grosvenor was the person to benefit, and that he, Bennett, was only to receive a commission. My case was that I had given Bennett an option to expire on the 20th of October. Grosvenor paid Bennett £2,000. Of this money the appellant took £600, and the other £1,400 was distributed to the order of Bennett.

I contend that there was no conviction. Moreover, the difference between the misdemeanours of conspiracy and false pretences was never explained to the jury.

The Lord Chief Justice: We do not give the leave to call further evidence now; upon the material before us we should refuse it. You are not shut out, however, from asking leave when the appeal comes on for hearing. If during the course of argument it should be desirable to call the evidence we shall not refuse. It is always open to this Court to hear further evidence, even though there is no application before us. The appellant may be present.

Leave to appeal granted.

Solicitors for the Appellant—*Osborn and Osborn.*

R. W.

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JOSIAH SMITH.

The disagreement of the judge with the verdict of the jury is not a conclusive ground for quashing the conviction.

This was an appeal against conviction, by leave of Scrutton J. Appellant was convicted of receiving stolen gold, at the Birmingham City Sessions, on the 29th April, 1914, and was sentenced to six months' imprisonment in the second division.

Hugo Young, K.C. (with him *Cotes-Preedy*) for the appellant, who was present. In this case there is no dispute on facts, the only question being whether the jury could reasonably draw the inference that the appellant had a guilty knowledge. He is a man of seventy-six years of age who has admittedly always borne an exemplary character. He has been all his life in the jewellery trade, and was in business on his own account between 1901 and 1905; he then made over the business to his sons, who employed him at a salary of £3 weekly. On many occasions he had bought from a man named Overbury nuggets formed from melting what is known as "lemel," that is the dust and chippings produced when gold is worked upon, on his own account, and without the knowledge of his sons. It was in respect of lemel that the appellant was convicted.

The lemel in question was stolen by Overbury, a man of good character, who had been for eighteen years employed as a porter by one Day, from whom he stole it. Overbury was known to the appellant, who bought it from him quite openly, and therefore the only question was whether he knew that it had been stolen. Overbury told him that he had got the chippings from a relation in London who was an engraver, and engravers are entitled to keep such chippings. He produced it in a registered envelope bearing a London postmark, which he had in fact picked up in Day's office and altered to "Overbury, c/o Day" for the purpose of deceiving the appellant. The latter received it at his son's office. When arrested the appellant made a perfectly frank statement to the police, and took them to his house, where he produced fourteen nuggets formed from the lemel out of a small safe. The price given by the appellant was a fair one, being at an average 25*s.* per ounce; their average value was 31*s.*

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per ounce, but out of this the cost of assaying had to be met. Some of the lemel he actually sold to Day, though in an altered form.

The summing up was in the appellant's favour, and on the jury convicting him the Recorder expressed his disagreement with the verdict. It was at the most a case of suspicion against the appellant, who gave a reasonable account of his possession of the stolen lemel. In these circumstances the conviction was unreasonable, and I ask the Court to set it aside.

J. G. Hurst, for the Crown, was not called upon.

The LORD CHIEF JUSTICE: The appellant was convicted on an indictment which charged him with Overbury, who pleaded guilty, with stealing and receiving gold on three occasions. He was convicted, and it cannot be said that in law there was no evidence fit to be submitted to the jury, or on which the jury could convict. But Mr. Young says that, taking all the circumstances into account, it was not a satisfactory verdict, although possibly there was some evidence to support it, and that it was an unreasonable verdict. This contention is supported by the Recorder's view, and no doubt that is an important matter for our consideration. As we have said more than once, however, the fact that a judge is dissatisfied with the verdict is not sufficient by itself to justify us in setting aside the verdict. It appears to us that there was evidence on which the jury could convict if they did not accept the appellant's explanation; it was entirely a matter for the jury, the appellant had the assistance of his counsel and a summing up in his favour—nevertheless, the jury convicted.

The appellant had been in business for many years, and has borne an excellent character. He set up in business on his own account in 1901, but in 1905 gave it up to his sons, remaining in their employ at a salary of £3 weekly. Overbury, who, to the knowledge of the appellant, was employed as a porter by Day, from whom he stole the gold, brought the gold to the appellant, saying that he had obtained it from a relative who was an engraver; he disposed of the gold at an all-round price of 25*s.* per ounce to the appellant, who sold it for 31*s.* 9*d.*; 1*s.* 6*d.* has to be deducted for the price of assay, so the appellant made a profit of between 5*s.* and 6*s.* an ounce over the transaction. In itself such

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a transaction was certainly of a character to expose the appellant to suspicion; of course, that is not enough to justify a conviction. A material fact is that the appellant, unknown to his sons, enters into transactions with a porter in just the kind of goods which the porter might possess himself of dishonestly, if he could find some one to dispose of them. The appellant received the lemel in nuggets, and sold it in the form of a bar to Day. In a cross-examination which we think was very important, but which has not been read to us, Mr. Hurst elicited that the appellant had taken part in no other transaction of this kind, and that no documents passed between the appellant and Overbury, not even receipts for money paid, although one would have expected the appellant to have records of transactions by him with a porter in Day's employment. All these were matters which the jury were entitled to take into account, and it resolved itself into a question which twelve ordinary jurymen were best able to answer. They came to the conclusion that the transaction was not consistent with honesty, and shewed guilty knowledge on the part of the appellant; this was an inference they were entitled to make from the evidence given; we cannot say that the verdict was unsatisfactory or unreasonable, and therefore the appeal must be dismissed.

Appeal dismissed.

Solicitors for the Appellant—*Philip Baker & Co.*, Birmingham.

A. L. B. T.

BEFORE

MR. JUSTICE AVORY, MR. JUSTICE ROWLATT, AND MR. JUSTICE ATKIN.

FREDERICK SIMON GROSVENOR (a).

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Assent to a false representation may amount to a false pretence by conduct.

The Court will not allow fresh evidence to be called unless there is some reason to believe that it would have affected the verdict.

This was an appeal against conviction, by leave of the full Court. Appellant was convicted of obtaining money by false pretences, at the Central Criminal Court, on the 5th May, 1914, before the Common Serjeant. Sentence was postponed.

E. E. Wild, K.C. (with him *J. P. Valetta* and *A. A. Baerlein*) for the appellant, who was present. The grounds of appeal in this case are three. That there was no evidence of any false pretence made by Grosvenor which justified the verdict; that there was misdirection; and that the verdict was wrongly taken. There is also an application for leave to call further evidence.

The indictment upon which Grosvenor was tried contained two counts: the first charging him with two others, Bennett and Levin, for conspiracy with one Chichester, to obtain money by false pretences from Captain Gardner; and the second with obtaining from Gardner the sum of £2,000 by false pretences. Levin was acquitted. The jury twice disagreed as to Bennett, and finally the Attorney-General entered a *nolle prosequi* in his case. Chichester was never in custody. Grosvenor was convicted upon the second count only.

(a) See p. 230, above.

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Captain Gardner first met the defendant Bennett at Bournemouth, they talked about shares, and Bennett said that he had an option from Grosvenor on 6,000 mining shares to be exercised before the 20th October. It was also represented that the shares were very valuable, and were at a premium of ten shillings. It was also represented that Levin had bought 40 shares at £60, and that he was willing to repurchase 2,000 more at thirty shillings per share.

Bennett represented that his option from Grosvenor was at £1 per share. Grosvenor said that the option, in fact, given to Bennett was six shillings per share. He received a sort of option note. Grosvenor was trying to make a market, and for this object he had also been buying back shares from Levin.

Bennett brought Captain Gardner to Grosvenor's office. Gardner was to have the first 2,000 shares, and Bennett said he would then take the remaining 4,000. There is considerable discrepancy between the accounts of Bennett and Grosvenor of what occurred at the latter's office, but it is quite clear that no cheque for £4,000 was in fact paid over by Bennett. Gardner gave a cheque for £2,000, but of this, in accordance with the option at six shillings per share, Grosvenor said that he only had £600, and that the other £1,400 went to Bennett or to his order.

I submit that there is no evidence against Grosvenor of obtaining money by false pretences. There may be evidence of conspiracy, but he was not party to the false pretence.

[AVORY J.: A man may be a party to a false pretence without opening his mouth. Supposing there is evidence of two persons acting together, and one making the false pretence, may they not both be convicted of obtaining money by false pretences ?]

There is no evidence that Grosvenor helped to induce Gardner to take these shares, and all he got out of the deal was his six shillings per share. Some of the evidence admitted did not relate to false pretences at all.

The jury acquitted of conspiracy, and I submit that the Common Serjeant ought to have differentiated between the two charges. There was no direction as to the difference between the two counts and the evidence admissible on each.

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The preliminary matter dealt with by the Common Serjeant in his summing up relates to conspiracy and not false pretences. Also he said that there was evidence that Bennett was making a false pretence as to the value of the shares, but was this in the presence of Grosvenor? He also spoke of the bogus telephone message to a broker as "clearly the act of Bennett," and Grosvenor had nothing to do with this.

When you have an indictment containing two separate offences, although one cannot object to that fact, I submit that a judge is bound to point out the evidence applying to one and that applying to the other. There was evidence, for example, about Chichester and about Christian Science which had nothing to do with this charge. This was a case, in effect, of false pretences only, and consequently the jury should have been told to dismiss a good deal of the evidence from their minds. You might take the view that this may have been a case of conspiracy, but I do still submit that the jury should have been directed as to what was evidence of conspiracy and what was evidence of false pretences.

Then as to the point that the verdict was wrongly taken. When the jury could not agree about Bennett, the Common Serjeant said: "I understand you find the prisoner Grosvenor guilty of obtaining money by false pretences." The answer was, "Quite right, my Lord." I submit that he had no right to ask such a question. He then went on to say that without Bennett they could not find him guilty of conspiracy, and suggested that a verdict should be entered solely for obtaining money by false pretences.

The verdict was not that of the jury, but of the Common Serjeant.

As to the question of further evidence, the position is this: The prosecution endeavoured to connect other parties with the £2,000. Grosvenor says, "I only got £600, £1,400 went to Bennett." Bennett said he only got about £95 as commission for introducing Gardner.

The price at which Grosvenor agreed to sell to Bennett was at six shillings per share, he therefore returned to Bennett fourteen shillings per share, or £1,400. Bennett says all I got was commission.

A clerk was subpœnaed to appear with the books of what was called "Grosvenor's Bank." On the last day of the trial this

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clerk, with the books which would have corroborated me on these matters, was stopped at the corner of Newgate Street whilst on his way to the Court by two men, one of whom took the books from him saying that Mr. Osborn wanted them. The books were later on returned anonymously. There is no doubt that these books were stolen at a most unfortunate moment, and we could not use them. When I asked for them in Court, I was told that they had been stolen. I knew nothing about it until then: I thought it might possibly be detrimental to my client to take the matter up at that time.

I submit that the books were taken by some confederate of Bennett's.

[AVORY J.: You might have applied for a postponement. You put us in the position of considering whether the books were not taken for some other reason, or at the instance of Grosvenor.]

The books shew that Bennett got much more out of the deal than he said he had done.

[AVORY J.: How would it have altered the jury's view about Grosvenor ?]

If the books proved that Bennett's story was untrue, and that the appellant's was true, they might have convicted Bennett and let Grosvenor off. It is a serious fact for me, and the Court has to decide between two different stories.

R. D. Muir and *Travers Humphreys*, for the Crown, were not called upon.

AVORY J.: In this case, having regard to what has happened in the case of Bennett, who was charged with the appellant, and especially in regard to the course which counsel tells us will be taken as respects him, it is inadvisable to say more than is necessary. In giving our reasons for dismissing the appeal it may be necessary to refer to the case of Bennett, but we will not do so more than is absolutely necessary. The appellant was charged with obtaining £2,000 from Captain Gardner by false pretences, and also with conspiring with Bennett, Levin and Chichester to obtain money by false pretences. He was convicted by the

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jury on the charge of obtaining the money by false pretences, and found not guilty on the charge of conspiracy. The jury were unable to agree as regards Bennett; there was a second trial, and they were again unable to agree; we are told that the Attorney-General intends to enter a *nolle prosequi*. All we have to do is to deal with the appeal of Grosvenor, and Mr. Wild, who has put before us all that can be said in his favour in the best possible way, bases the appeal on three grounds; he further applies for leave to call further evidence. The grounds of appeal are, first, that there was no evidence of any false pretence having been made by the appellant that would justify the verdict. It is necessary to amplify that contention a little. To be successful it must be shewn that there was no evidence that the appellant made, or was a party to making, any false pretence by which Gardner was induced to part with the £2,000.

The second ground is that the difference between the charge of obtaining money by false pretences and the charge of conspiracy was not properly explained to the jury. It seems to the Court that the two cases go together, and for this reason: two persons may conspire and, if they do, a criminal offence is committed, although no false pretence is in fact made, and no money obtained. If the false pretence is made, and the money obtained, then those persons have obtained money by false pretences, and are liable to be convicted of that offence. A person may both conspire and also be guilty of obtaining money by false pretences. When the case for the prosecution is that two or more persons combined to commit an offence it may be that one only of them made the false pretence, and one only obtained the money by false pretences, yet two or more may be guilty on proof that they were acting jointly. That was the kind of case that was put before the jury; all, therefore, that the Court has to see is whether there was evidence that the appellant made the false pretences either alone or jointly. It is quite clear to the Court that he was a party to the false representations that Bennett had on the 20th October an option to take 6,000 of these shares at the price of £1 a share. It matters not whether this was said by the appellant, or whether he by his conduct assented to it. There was evidence that the representation was made jointly. Further, there was evidence of a representation that Bennett was only in a position to take 4,000 of the 6,000 shares, and evidence of a representation that the shares were

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then worth at least £1 a share; that is leaving out of account as against the appellant the evidence of a pretended conversation on the telephone by Levin. There was further evidence of a representation having been made that at that time Bennett was in fact exercising his option to purchase at £1. It is clear that Gardner was induced by these representations to take 2,000 shares at £1, and it is not disputed that the representations must have been made with intent to defraud. Therefore there was evidence, in the opinion of the Court, on which the jury could come to the conclusion that the appellant was a party to making the false pretences.

It is said that the Common Serjeant did not direct the jury on the difference between the charges of conspiracy and obtaining money by false pretences. It is only necessary to read the first and the concluding passages of the summing up to see that there is no foundation for this contention; he said: "In this case the three prisoners are charged first generally with a conspiracy to defraud Captain Gardner by divers false pretences, that is to say, by some sort of trickery and false representations, to buy shares in this company. That charge of conspiracy does not involve—it may be proved without establishing—that Captain Gardner was induced to buy by that conspiracy, or induced to buy any shares in consequence of the general act of a conspiracy to defraud him into buying some shares. There is another charge against the three defendants: that they did by false pretences, which are set out, induce him to part with £2,000 for the shares." There is, therefore, no ground for the complaint.

The third objection urged is that the verdict was wrongly taken. It is difficult quite to appreciate the point when we ask Mr. Wild to say in what way the verdict ought to have been taken. The jury said "Guilty," and that on the face of it means guilty on the whole indictment. The Common Serjeant pointed out that as they had not agreed with regard to Bennett it would be better to acquit the appellant on the charge of conspiracy, and they did so. The Court sees no reason for complaint. The only other way in which the verdict could have been entered would be conspiracy with the other person named.

The last point is an application to call further evidence as to the books of the appellant's bank, by which it is sought to shew that the evidence of the appellant was correct, and that of Bennett

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incorrect. In order to justify the Court in allowing this evidence to be called we must be satisfied that the evidence would, or probably might, have induced the jury to form a different opinion on the guilt of the appellant. We are not called on to express our opinion as regards Bennett. The Court is clearly of the opinion that, assuming all that was said by the appellant about the contents of these books, which was unchallenged by the prosecution, and assuming the books to shew a deposit of £2,000 as he said, it would have had no influence on the jury in determining the case. In other words, the Court agrees with the words of the Common Serjeant, "It does not matter whether he got more or less, or Bennett got more or less, if he was joining with Bennett in falsely representing these shares were of value when they were worth nothing at all." For these reasons the appeal fails.

Appeal dismissed.

Solicitors for the Appellant—*Osborn and Osborn.*

S. W.

WILLIAM GREENWAY.

Fresh evidence.

The Court receives with caution the evidence of co-defendants and convicted prisoners in favour of the appellant.

This was an appeal against conviction, by leave of Scrutton J., and an application for leave to call further evidence. Appellant was convicted of larceny, at the Chelmsford Assizes, on the 4th February, 1914, before Bray J., and was sentenced to eight months' imprisonment with hard labour.

Warburton for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant was charged with one Wheeler, who pleaded guilty, with stealing a ham at Romford on the 10th December, 1913. He was not arrested until some time afterwards, and the case for the prosecution turned on evidence of identification, which was very weak. Two witnesses

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said they were not sure whether it was the man they had seen with Wheeler, one failed to identify him altogether, and only a witness named Blackwell identified him positively. Unfortunately the appellant set up an *alibi*, and called witnesses to support it, but it broke down hopelessly, and this considerably prejudiced his defence. After conviction he protested his innocence, and said that he knew who it was with Wheeler, but was not going to say; Wheeler also declared that it was not the appellant who assisted him in the crime. The appellant now says it was a man named Allen who was the guilty person, and I ask leave to call Wheeler and Allen, who is now undergoing a sentence of imprisonment on another charge, although I have no proofs, and do not know whether their evidence will assist me.

The Court gave leave for the witnesses to be called.

James Wheeler called, stated that the appellant was innocent, but he refused to say who it was who assisted him.

John Allen called, stated that he knew Wheeler, but under another name. He was not with him on 10th December, and had nothing to do with stealing a ham then. He had worn a moustache since 1911.

[The appellant was clean shaven, but at his request a warder from Chelmsford Prison stated that he had had a moustache at the time of his trial.]

E. H. Tindal Atkinson, for the Crown. Blackwell, the witness who did identify the appellant, had seen the two prisoners attempting to ring the changes in his shop on the afternoon of 10th December. This incident would have impressed the occurrence on his mind, and makes his evidence more reliable.

ROWLATT J.: The appellant was convicted on a charge of having been concerned with Wheeler in stealing a ham at Romford on the 10th December, and he appeals on the ground of mistaken identity. The evidence of identity was in one sense slight, because the witnesses did not express themselves in terms of great positiveness. There were three witnesses; the first, Langston,

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who saw the theft, and therefore was likely to notice the men, said the appellant was like the person he saw. The wife of the fishmonger who sold the basket in which the ham was put was more positive at the trial than at the police-station or before the magistrates; a third witness spoke to the appellant being in the company of Wheeler for a common purpose on the same day, and his evidence was clear on the point.

The appellant when arrested said that he had not been in Romford for thirty years, and at the trial he set up an *alibi* which broke down. On that Bray J. left the case to the jury with great care, and the appellant was found guilty. We are not entitled to upset that verdict unless it was unreasonable or unsupported by the evidence. A case of mistaken identity may occur, but this Court, in the absence of further evidence, is not in so good a position to decide the question as the jury.

But a further development has occurred. The appellant has suggested that he knows who it was who was with Wheeler, namely Allen. Allen has been called and denies it, but it is necessary to point out that even if he had admitted it it would have been by no means conclusive. It is a familiar incident for a convicted criminal to confess to a crime of which another person has been convicted. The question does not arise here, and Wheeler refuses to say who was with him on the day in question, although he says it was not the appellant. We have seen both men, and it is conceivable that one might be mistaken for the other, but that of itself is quite insufficient to enable us to disturb the verdict.

Appeal dismissed.

A. L. B. T.

BEFORE

MR. JUSTICE A. T. LAWRENCE, MR. JUSTICE LUSH, AND MR. JUSTICE ATKIN.

CHARLES HILDYARD THORNTON WHITAKER.

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A "public officer" is one who discharges any duty in which the public are interested, for which he is paid out of moneys provided for the public service, and must either be a "judicial" or a "ministerial" officer.

A letter mentioning a third party may be evidence against the latter on his trial in the sense that the onus *is on him of explaining it, if other evidence has raised a presumption connecting him with the contents of the document.*

This was an appeal against conviction on points of law, and an application for leave to appeal against sentence. Appellant was indicted, at the Central Criminal Court, with one Minto for that they, on February 1st, 1904, and on divers days between that date and July 19th, 1906, did unlawfully conspire with one Ness and other persons that divers sums of money and divers valuable securities should be corruptly given by Minto and Ness and Lipton Limited, to the appellant in his official capacity, he then being a public and ministerial officer, to wit, a commissioned officer in the public service of the King, and that the same should be corruptly accepted by the appellant as inducements in violation of his official duty to shew favour and abstain from shewing disfavour to Minto, Ness, and Lipton Limited, in relation to divers contracts. The second, fourth and sixth counts charged appellant on three different days that he being a public and ministerial officer, to wit, a commissioned officer in the public service of the King, unlawfully and corruptly took in his official capacity gifts and considerations from Minto, Ness, and Lipton Limited, as inducements to shew favour to the said Minto and Ness and Lipton Limited, in relation to contracts for catering in violation of his official duties. He was convicted, after three

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days' trial, on the 27th day of May, 1914, before Darling J., and was sentenced to six months' imprisonment in the second division. Minto and a number of other employees of Lipton Limited had previously pleaded guilty to a conspiracy at common law (in similar terms to those above), and, under the Prevention of Corruption Act, 1906, to bribing quartermasters and non-commissioned officers in connection with other canteen contracts. The facts of the case appear sufficiently in the judgment.

T. M. Healy, K.C. (with him *Comyns Carr*), for the appellant, who was not present. The three grounds of appeal are (1) that the offence of which the prisoner was convicted is unknown to the common law; (2) that evidence was illegally admitted; (3) that there were serious omissions in the summing up. The date of the alleged offence is before the coming into force of the Prevention of Corruption Act, 1906, 6 Edw. 7, c. 34, and yet some of the terms of that Act are used in the indictment. The charge against Col. Whitaker is as a "public and ministerial officer," and the phrase "public officer," on which the Crown must rely, comes from Stephen's Digest of Criminal Law, 3rd ed., Chap. XI., pp. 82—83, the foundation for which is the Fifth Report of the Commissioners on Criminal Law, pp. 40, 47 (1840), which, however, differs from the later Seventh Report, pp. 153, 157, 159 (1843). I submit that the common law offence of bribery is confined to judicial officers and the sale of offices. 3 Inst. pp. 145—147; 4 Blackstone's Commentaries, 21st ed., p. 139; 1 Hawkins's Pleas of the Crown, 8th ed. (Curwood), p. 414; B. I. c. 67, 7th ed. (Leach); 1 Hale's Pleas, p. 262. The old authorities do not recognise the common law offence of bribery except in judicial persons. Until this case no one has ever laid down the proposition that a military officer is a "public officer," and Stephen in his Digest negatives it. The offence is a statutory one, punishable by court martial (42 & 43 Vict. c. 33, the Army Discipline Act, 1879, s. 23); but the prosecution would have had to be within three years. As this was an offence punishable under the Army Regulations (if proceedings had been taken in time), that is a cogent argument that it is not an offence at common law. The Crown's argument involves the proposition that every officer, commissioned and non-commissioned, and every soldier, whether on home or foreign service, is a "public and ministerial officer."

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Assuming that the indictment is good, I submit that there is no legal evidence in existence to support it. Proof of the existence of a conspiracy must be produced before evidence of acts and declarations by co-conspirators can be admitted. Stephen's Digest of the Law of Evidence, p. 6. Here evidence was allowed to be given by a witness of a general system of corruption among quarter-masters and inferior soldiers, and then he was allowed to produce a certain letter from Ness to Minto of October 18th, 1905 [see below]. Before that letter could be evidence against Col. Whitaker the conspiracy charged should have been proved. All that was in evidence against Col. Whitaker was that he received a cheque. You cannot use the letter except as evidence of an overt act after proof of the conspiracy. *Blake and Tye*, 6 Q. B. 126; 8 Jur. 148; 13 L. J. M. C. 131 (1844).

[LUSH J.: Is not the fact that Col. Whitaker received cheques at times corresponding with the contracts sufficient to admit this letter against him ?]

As to the meaning of "office," see Russell on Crimes, Vol. I., pp. 620—621, 7th ed. "Office" does not include military office. *Berrisford* v. *Dunn*, 1 Vernon, 98, note at p. 99 (1682).

In his summing up Darling J. should have pointed out that Col. Whitaker's regiment did not get any less rebate than other regiments. He was not entitled to rely on the letter of October 18th, 1905, as the chief proof against Col. Whitaker. He should have warned the jury that the Prevention of Corruption Act did not apply; he should have pointed out to the jury that there were earlier contracts in respect of which no payments to Col. Whitaker were proved, and he ought not to have said that it did not matter whether the original inception of the contract was corrupt or not.

The sentence was too severe. All the other defendants got off with fines. It must be remembered that this was before the Prevention of Corruption Act.

Sir J. Simon, *A.-G.* (with him *R. D. Muir*, *Travers Humphreys*, and *Branson*), for the Crown. On the point whether there is a common law offence of bribery in a military officer, the common law is adjustable. It is not a code within the strict limits of which you must bring yourself. It is always extending. If

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the principle is well defined and the offence falls within it, the common law applies. The principle is that a public officer is one who has to perform a public duty, and any one is guilty if he attempts to corrupt a public officer in the performance of his public duties. Codified military law is not concerned entirely with offences which are no offence against common law. The two overlap, *e.g.*, stealing. Some offences are only criminal offences under the Army code, *e.g.*, speaking with incivility to a superior. Bribery to do something which is a breach of the common law is a common law offence, although the offence may be cognisable by the military courts. There is nothing to justify the view that there is no such offence as bribery of a military officer. *Henly* v. *Mayor of Lyme,* 5 Bing. 91 (at p. 106, *per* Best C. J., p. 107); 6 L. J. (O. S.) C. P. 222; 30 R. R. 542 (1828).

Military forces of the Crown must be discharging a public duty. "Judicial" and "ministerial" are exhaustive categories of officers. There can be no officers performing a public duty who do not come within them. This view is supported by Pollock on Torts, Chap. IV., p. 123, 9th ed. *Vaughan,* 4 Burrows, p. 2494, at p. 2500 (1769), is an example of an officer plainly not "judicial"; *Beale* (1798), referred to in *Gibbs,* 1 East, 183 (1800; the original report in the Rolls was subsequently produced, Roll 22, 38 Geo. III. 1798, Easter Term, and shewed that the offence was one at common law); *Lancaster and Worrall,* 16 Cox C. C. 737 (1890), *per* Willes J. The real test is whether the duty arises merely by contract or whether it is a public duty.

You may have a criminal conspiracy, although the object of the conspiracy was not to commit a crime. *De Kromme,* 17 Cox, 492; 66 L. T. 301; 56 J. P. 682 (1892). In this case it was in his official capacity as commanding his regiment that Col. Whitaker had a duty to perform, and the money which he administered was really public money; the trust was imposed on him by the law. See Rules for the Management of Garrison and Regimental Institutes, Regulations No. 2, p. 6, and No. 43, p. 15.

There is no law about the order in which you are to prove the elements necessary to make up conspiracy. You must prove the agreement here by acts. As regards Col. Whitaker, the most important fact is that he received the money. He himself gave evidence.

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An officer in the Army is a "public officer," and it is submitted that he is also a "ministerial" officer; but in any case a public officer can be guilty of being bribed. Col. Whitaker was in this case a trustee administering a fund which was really public money, and it was his duty to keep himself clear of all influence from the contractors. The main charge is one of conspiracy, and it is enough to support that if the act to be done was itself wrongful to other persons, even if it did not amount to a crime. *Mayor, &c. of Salford* v. *Lever*, 1 Q. B. 188; 60 L. J. Q. B. 39; 63 L. T. 658; 71 L. T. 459 (1891), shews that this act was illegal at common law.

The Court will only interfere with the sentence if it regards it as excessive in view of all the circumstances. This was not a sudden temptation, but was going on over a series of years. Col. Whitaker was the despotic head of his regiment, and his men's comfort depended on him. It is immaterial what the sentences on other persons were.

Comyns Carr, in reply. No offence at common law is disclosed in the indictment. The elasticity of the common law depends on whether new circumstances have arisen. *Jefferys* v. *Boosey*, 4 H. L. C. 815; 3 C. L. R. 625; 24 L. J. Ex. 81; 1 Jur. N. S. 615 (1854). The matter should be considered historically. The maintenance of an army in time of peace was first authorised by Parliament by the Mutiny Act, 1689, and in every Mutiny Act you find the section which makes it a punishable offence to take a bribe in order to let a person off his liability to have soldiers billetted on him; while from the earliest times the offence, which is now s. 23 of the Army Act, was punishable under the Articles of War. I submit that the common law cannot be held to apply to an offence which is dealt with by statute from its first inception. *Vaughan* does not extend the matter beyond the third head in Hawkins's Pleas of the Crown. That was a case of a bribe to give corrupt advice to the King. In any case, Col. Whitaker was not performing a public duty. The contract was not a public contract. The mere receipt of money has never been held to constitute a *primâ facie* case of bribery without evidence of the purpose for which it was given, and the letter of October 18th, 1905, which cannot be looked at until the *primâ facie* case has been made out, is the only evidence

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here of the purpose for which the money was paid. You cannot have a conspiracy unless the subject of the conspiracy is an indictable misdemeanour.

A. T. LAWRENCE J.: Col. Whitaker was convicted on indictment at the Old Bailey, and was sentenced to six months' imprisonment in the second division. Against this conviction and sentence he appeals. The facts of the case were that Col. Whitaker was the Commanding Officer of the Yorkshire Light Infantry stationed at Malta. In his capacity as Colonel it was his duty to determine the form in which the canteen should be carried on. He determined that the system should be that of tenancy by a canteen contractor, a system which gives the contractor, to some extent, a monopoly of the custom of the regiment. The contractor pays for his tenancy by rebates, which are used for the benefit of the regiment. The Colonel is the person who on behalf of the regiment determines the form the contract shall take, and enters into the contract with the contractor. In this case Col. Whitaker entered into contracts through Ness, who was Lipton's agent.

The prisoner was tried with Minto, who was Lipton's manager in England. They were charged with conspiring to act corruptly in connection with the canteen contracts. The facts shewed that Col. Whitaker received sums of money from Ness amounting in all to £540. It was in evidence that these canteen contractors were minded to pay money as bribes to persons who could influence the obtaining of contracts. The evidence certainly shewed that the commercial morality of the contractors was very low. Col. Whitaker received these sums of money at times spread over the period of his service at Malta, Crete, and Sheffield. The dates of the contracts into which he entered were as follows: first contract, December, 1902; second contract, February, 1904. Modification of first contract, 1904 and 1905. Further contract or further modification of existing contract, 1905.

The dates of the payments of the various sums, amounting to £540, to Col. Whitaker were, £120 on February 18th, 1904, that is approximately at the time of the second contract, £120 six months afterwards, £150 on March 31st, 1905, and £150 by cheque dated October 16th, 1905. The contracts were for tenancies for either one year or six months, generally for one year. These

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facts are coupled with a letter from Ness to Minto, which is said to be inadmissible against Col. Whitaker. It is clearly evidence of conspiracy between Ness and Minto to bribe Col. Whitaker to shew favour or abstain from shewing disfavour. The letter is as follows:—

Messrs. Lipton, Limited, London.

Poste Restante, Wiesbaden,
18*th October*, 1905.

Dear Sir,

Colonel Whitaker writes me to-day for his six-monthly cheque, stating that as he wishes the matter kept as privately as possible he would like me to send the cheque as before. This I have done to-day—£150 by National Bank of Scotland cheque, No. $\frac{0}{10}$ 370569.

He adds: "I suppose the contract will require renewal, let me hear soon about this. I have not yet had the pleasure of meeting Mr. Minto, but hope to see him soon, when I next go to London."

Will you please attend to "contract renewal" as mentioned above?

Yrs. truly,
JAS. R. NESS.

Archibald Minto, Esq.

This letter is clear evidence against Minto that he and Ness were conspiring to pay money to Col. Whitaker with a view to the renewal of the contract. It is argued that it is not admissible against Col. Whitaker. No doubt there was a time in the case when the statements in it were not admissible against Col. Whitaker. It was always admissible against Minto, and the *fact that it was sent* was always admissible. But it is said that the statements in it never became admissible against Col. Whitaker. When it was proved that money was paid to Col. Whitaker, that it was paid by Ness, that Ness's banking account was fed by Lipton's paying notes into the bank, it raises the presumption that Col. Whitaker is doing something for Ness and Minto for which he was paid. Col. Whitaker must then explain the circumstances in which he was being paid. This raises a cloud of suspicion against Col. Whitaker, the *onus* is changed, and Col. Whitaker must explain the payments. Once the letter became

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admissible counsel for Col. Whitaker, quite properly, called the prisoner. He admitted that he received the money, but said that he was acting as a recommender to other regiments of Lipton's and of the brewery which was supplying his canteen. This was done without disclosing the fact that he was receiving money to do it. Col. Whitaker distinguishes between what he did for other regiments and what he did for his own, but such a distinction is quite fallacious. Though his duty was not so close to other regiments, it still existed in his capacity as an officer of His Majesty's Army. The letter is admissible evidence against Col. Whitaker.*

Then, the question was raised whether the indictment discloses any offence by Col. Whitaker. We do not think that the historical treatment by codes and drafts of codes, and by old text-books, has afforded any assistance. The indictment states that Col. Whitaker and Minto conspired with Ness that divers sums of money should be corruptly given to Col. Whitaker in his official capacity, he then being a public and ministerial officer, to wit, a commissioned officer in the public service of the King, and that the said sums of money should be corruptly accepted by Col. Whitaker as inducements to him in violation of his official duty to shew favour and abstain from shewing disfavour to Minto, Ness, and Lipton's in relation to divers contracts. It is said (a) that does not disclose a common law crime, (b) that Col. Whitaker was not a "public and ministerial officer." We think a public officer is one who discharges any duty in which the public is interested, and more particularly if he receives payments from public money. The addition of the words "and ministerial" does not affect the matter. We think he is a ministerial officer, and that the word is used in contrast to "judicial" as the Attorney-General argued. This objection that you do not commit a crime if you bribe officers other than judicial, or that it is only a misdemeanour if the bribe is given to obtain an office, is not correct —there is ample authority against it. Whenever an officer has a public duty to perform, to bribe that officer to induce him to shew favour or abstain from shewing disfavour in violation of his duty constitutes a misdemeanour. The common law abhors fraud and corruption as nature abhors a vacuum. It is indictable

* There seems to be no decided case directly in point; but see *Phipson* on Evidence, 5th ed., pp. 78—9, 86—8.

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as a misdemeanour. The law is laid down by Lord Mansfield in *Vaughan's Case*, 4 Burrows, at p. 2500. Lord Mansfield says: "A minister trusted by the King to recommend fit persons to offices would betray that trust and disappoint that confidence if he should secretly take a bribe for that recommendation. A terrible consequence would result to the public if everything that such an officer is concerned in advising the disposal of should be set up for sale." And at p. 2501: "If a party offers a bribe to a judge, meaning to corrupt him in a case depending before him, and the judge taketh it not, yet this is an offence punishable by law in the party that offers it; so also a promise of money to a corporator to vote for a mayor of a corporation. And so also must be an offer to bribe a Privy Counsellor to advise the King. Therefore it appears to me that this is a misdemeanour." And Yates J. said: "No doubt this is an offence at common law." This is an authority that where a person in the position of trustee to perform a public duty takes a bribe to act corruptly in discharging that public duty, it is a misdemeanour. And *Lancaster and Worrall* is another authority. In *Beale's Case* (cited in *Gibbs*, 1 East, 183) it was held that the officer in charge of French prisoners, who took a bribe to alter the order in which they should be exchanged, was guilty of an offence. That was a strong case, as the persons affected were foreigners, but yet they were given the protection of our laws, and the officer was held to be committing an indictable misdemeanour. Bribing a colonel to corruptly shew favour to a firm supplying canteen provisions is clearly a misdemeanour of grave importance. The colonel is a trustee with a duty to perform, and to receive money and thus to put himself in a position where his interest and his duty conflict, is a misdemeanour at common law, and a serious one. It is not denied that if we are right in saying that the counts for bribery are good, that then the conspiracy count is good. But it has been rightly argued for the Crown that whether these common law counts for bribery are good or not, yet the conspiracy count is in any case good. This is correct It is not necessary that the agreement should be to commit a crime. It is sufficient that the agreement should be to do any act unlawful or wrongful in the sense of being a tort on another person, at any rate, where there is fraud and corruption involved. It is clear that whenever the tort is a fraudulent or corrupt act on the part of the persons agreeing, then it becomes a

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misdemeanour at common law. *Warburton*, L. R. 1 C. C. 274; 40 L. J. M. C. 22; 23 L. T. 473; 19 W. R. 165; 11 Cox C. C. 584 (1870: cited in *Reg.* v. *Aspinall*, 2 Q. B. D. 48; 46 L. J. M. C. 145; 36 L. T. 297; 25 W. R. 283; 13 Cox C. C. 563 in 1876). We have been asked to reduce the sentence. We think that we cannot do so. This Court is not charged with the revision of sentences except where they are clearly excessive. We cannot say that is so here. Clemency is a matter for the minister charged with that duty, we are not in a position to say anything on that subject. The sentence may run from the date of the conviction.

Appeal dismissed.

Solicitors for Appellant—*Long and Gardiner*.

E. A. P.

BEFORE

MR. JUSTICE RIDLEY, MR. JUSTICE COLERIDGE, AND MR. JUSTICE SCRUTTON.

JOHN BEAUCHAMP NOEL.

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There may be a conversion of money within the Larceny Act, 1901, *by one who did not receive it from the owner or even as his money.*

It is not a general rule that a depositee of money may use it for his own purposes; Hotine, 68 *J. P.* 143 (1904), *considered.*

The protection given by s. 85 *of the Larceny Act*, 1861, 24 & 25 *Vict. c.* 96, *does not extend to an incriminating disclosure in a document produced by the person incriminated by order of the judge at the trial; whether an answer given by a witness, who has unsuccessfully claimed privilege on the ground that it tends to incriminate him, is a "compulsory process" within that section*, quære.

This was an appeal against conviction on the certificate of Mr. Commissioner Atherley-Jones, who tried the case. Appellant was convicted, at the Central Criminal Court, on the 28th May, 1914, of fraudulent conversion of sums of £200, £65 and £1,000, and was sentenced to fifteen months' imprisonment in the second division.

A. Powell, K.C. (with him *A. Lawton*), for the appellant, who was present, stated the following facts as proved by the witnesses. The appellant was employed as managing clerk by one Barrett, a solicitor, and, in addition, transacted business of his own as a financial agent. In April, 1912, Barrett was acting as solicitor for Baron Brunicki, who had, *inter alia*, brought an action to recover a large sum, and he having written asking the Baron for money in preparation for trial, the Baron replied desiring that, as money was in Court, Barrett should finance the case, and on the trial ending he should be repaid. Barrett accordingly did so, Noel assisting with money, and at the trial of the action in May an order was made for payment out of Court to Baron Brunicki of £5,000. On the Baron's authority Barrett received the £5,000, and early in June opened a separate banking account with it. He then wrote to the Baron that Noel would see him in Paris "as to the disposal of the £5,000, and as to the bill of costs." The appellant did not give evidence at the trial, but Barrett, who was called for

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the prosecution, in his evidence stated that he and Noel arranged that the Baron should be asked to leave £500 of the £5,000 on account of costs, and in anticipation Barrett, on June 7th, drew on the account a cheque for £200 to self or order, and handed it to Noel, he said, in consequence of the Baron's letter of April, and in part repayment of the advances Noel had made. On the same day he drew to the order of Baron Brunicki two crossed cheques, blank as to amount, and Noel took them to Paris. At an interview there with the Baron on June 9th one was filled up for £3,500, and the other for £1,000, and the Baron endorsed them and handed them back to Noel. There remained the balance of £500, but Baron Brunicki in his evidence did not accept the suggestion that this was left for costs, though he was unable to say why the second cheque was filled up for £1,000 only. Noel returned to London on the 10th June with instructions to send the £3,500 to Baron Brunicki's bankers at Warsaw (and this was done), and the £1,000 was to be held by the appellant at the disposal of Baron Brunicki. Barrett then drew further cheques on the said banking account, one being for £65 to self or order, and this he handed to Noel, in further payment, he said, of moneys advanced by Noel to him on account of Baron Brunicki's litigation. Noel had no banking account of his own, but he, and he alone, was entitled to operate upon the account of the Cosmopolitan Finance Company at the City and Midland Bank, Bond Street, which he habitually used for his own purposes. He paid the three cheques for £200, £65 and £1,000 into this account, and he drew out the £265 in various sums. All through the month of June the £1,000 remained to the credit of the Cosmopolitan Company's account, the balance on 30th June being £1,116. On the 6th July drawings on that account had reduced the balance a few shillings below £1,000. On 15th July the balance to credit was £773 7*s*. 1*d*. Evidence was given at the trial by the appellant's wife and son, and one M. Gibson, that the appellant had cash in his possession at all material dates sufficient to make good the balance of £1,000, but there was no evidence to shew that such cash was in fact his own. On 15th July the appellant again saw Baron Brunicki in Paris, who in his evidence stated that at that interview he discussed what should be done with the remainder of his £5,000 in Barrett's hands, which Baron Brunicki said was referred to as £1,500 without any mention of a sum

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being retained thereout by Barrett on account of costs, and the appellant recommended that it should be invested in Useful Requisites, Limited. Baron Brunicki then and there signed a transfer taking 1,500 shares in that concern, and handed it to the appellant, agreeing to the investment subject to Barrett's supervision and approval. Useful Requisites was then doing a considerable business, and Barrett approved the transaction, and the shares were duly transferred to Baron Brunicki. On 17th July £500 was taken out of the account of the Cosmopolitan Company and transferred to that of Useful Requisites, Limited, opened on that date by the appellant. On 16th July Noel, for Barrett, wrote to Baron Brunicki referring to the investment of "his £1,500."

1. Upon these facts, it was submitted, there was no fraudulent conversion of the property of Baron Brunicki in respect of either of the cheques in question, viz., £1,000, £200, or £65. The appellant never touched the £5,000 which Barrett received on behalf of Baron Brunicki. Barrett paid the £5,000 into his own banking account. As to the cheques for £200 and £65 they were drawn by Barrett in his own favour, and endorsed to the appellant in repayment of advances. The £200 and £65 were never entrusted to the appellant by Baron Brunicki. Barrett was the person entrusted. The appellant did not receive them as the monies of Baron Brunicki, but as the monies of Barrett, and the case, so far as these two sums were concerned, was not within either clause of the Larceny Act, 1901, 1 Edw. 7, c. 10, s. 1. It was submitted that the judge ought to have withdrawn the case as regards the £200 and £65. As to the cheque for £1,000, it was submitted that using money got from cashing a cheque given for a purpose was not a criminal offence. *Hotine*, 68 J. P. 143 (1904). The appellant was a depositee; he held the £1,000 as Baron Brunicki's banker. He was entitled to use it, but must pay when called upon to do so. There could be no fraudulent conversion if it was established that the appellant had £1,000 ready from any source to pay Baron Brunicki down to July 15th, the time when he took the shares in lieu of the money. The appellant was only bound to have an equivalent, and the evidence as to this equivalent being available was not mentioned in the summing up.

2. It was further submitted that appellant was wrongly convicted upon the ground that the prosecution in the case of all the

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cheques resulted from admissions made by the appellant in the course of a civil action brought by Baron Brunicki against Barrett and Noel to recover £1,500, when the appellant voluntarily gave evidence on his own behalf, but during his cross-examination was ordered by the Lord Chief Justice to produce the pass-book of the Cosmopolitan Company, into whose banking account he admitted that he had paid the £1,000 cheque, and any books and documents shewing the disposal of Baron Brunicki's £5,000, and that the disclosures so made by him were the first disclosures of the facts, as counsel for the prosecution had expressly admitted. It was submitted that such admissions were made under a "compulsory process" within the Larceny Act, 1861, s. 85, and that the appellant was not liable to conviction in respect thereof. See *Skeen*, Bell C. C. 97; 28 L. J. M. C. 91; 5 Jur. N. S. 151; 7 W. R. 255; 8 Cox C. C. 143 (1859). Cross-examination is a process, and is compulsory because no witness can escape from it. In a case of conversion it is of no use to claim privilege from answering, for s. 85 expressly says there shall be no privilege, but, on the other hand, it protects from consequences. Compulsory examination has been explained as meaning an examination on which there is, or can be, cross-examination. *Pike*, (1902) 1 K. B. 552; 71 L. J. K. B. 287; 86 L. T. 205; 50 W. R. 672; 66 J. P 296; 9 Manson, 121; 20 Cox C. C. 163: C. C. R. Here, in addition to cross-examination, there was the judge's order to produce the bank-books. See also *Garbett*, 1 Den. C. C. 236; 2 Car. & K. 474; 2 Cox C. C. 448 (1847); *Gunnell*, 16 Cox C. C. 154; 55 L. T. 786; 51 J. P. 279: C. C. R. (1886); and *Oliver*, 3 Cr. App. R. 246 (1909).

3. The conversion being alleged to have occurred in June, evidence was improperly admitted of events in the following October, tending to shew that the appellant had not been frank when asked where the money was invested. This was evidence of conduct prejudicing the appellant, and not so connected with the events in June as to be admissible. There were also various misdirections consisting of misstatements of facts made, no doubt, unintentionally.

Travers Humphreys (with him *Bodkin* and *M. Shearman*), for the Crown, was not called on with reference to the cheque for £1,000 The cheque for £200 was cashed by the appellant with-

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out any authority from Baron Brunicki; this was clearly conversion, and the only question was whether it was fraudulent; there was evidence on which the jury could find it to be so, and the summing up was perfectly fair. The same applies to the cheque for £65. The case for the prosecution as to all the sums was that Noel had no right to deal with them, and knew it, and that the share transaction of July was brought about by him to cover up the conversion in June.

As to the case of *Hotine*, my submission is that the Common Serjeant did not intend to lay down a general proposition. The facts in this case are very different. Hotine must have been carrying on a genuine business, as otherwise he would have been indicted for obtaining money by false pretences, whereas the only other charge against him was under s. 31 of the Bankruptcy Act, 1883, under which fraud is immaterial. There is nothing in the Larceny Act which makes it necessary to keep separate money which has been received honestly.

The word "question" in s. 85 of the Larceny Act, 1861, must mean a question put by compulsory process, and the meaning of "compulsory process of any Court of law" is to be found from the examples given, namely, answers to a bill in equity or to an interrogatory. There was no evidence of any compulsion in this case, and the cases cited do not touch the point.

Powell, K.C., in reply.

RIDLEY J.: This case has been argued at length, but we are all of opinion that the conviction can be supported on the indictment in general. If any doubts did arise with regard to the cheques for £65 and £200, the conviction could still be supported on the authority of *Holloway*, 17 Q. B. 317; 2 Den. C. C. 287 (1851); and also under s. 5 of the Criminal Appeal Act, which gives power to the Court to enter judgment on the counts that are good. But it is not necessary for us to proceed on that ground, because in our opinion the appellant was properly convicted on these counts.

The appellant was indicted for the fraudulent conversion of three sums, £200, £65, and £1,000, under the Larceny Act, 1901, s. 1 (1) (a) and (b), being charged with converting the money after being entrusted with it for safe custody, and after receiving it for and on account of another person. Mr. Powell says

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that the conviction cannot be supported because the facts bring the case within the decision in *Hotine*. That was a case where money was delivered to an employer as a guarantee of the honesty of persons employed by him, and the question was whether the money so entrusted was within the Larceny Act, 1901. According to the view of the Common Serjeant and of Phillimore J., the money could not be so treated; they regarded it as money which the employer was entitled to use. If so, it became a loan. *Hotine* was treated in this way by Lord Alverstone C. J. in *Lord*, 69 J. P. 467 (1905); C. C. R. If *Hotine* is to be treated otherwise, it cannot be supported. In this case the money was entrusted to the appellant for safe custody. At one time we were disposed to think that the cheques for £200 and £65 stood on a different basis to that of the one for £1,000, but we do not now think that was the case. It seems to us that the conversion was the same in the three cases; and it was a question for the consideration of the jury. The absence of the appellant from the witness-box is a matter on which we are entitled to comment, and which the jury were entitled to consider. It seems to us impossible to forget that that was the position, and the jury were entitled to reject any evidence which they did not believe. There was ample evidence that the appellant was entrusted with money for one purpose, and used it for another.

It is necessary to say something about what happened in July when the investment was made in the Useful Requisites Company. The letter of July 16th is very important, for it stated to Baron Brunicki that his instructions for the investment of the £1,500 had been carried out. If that means that the money was still there to invest, it is inconsistent with the defence that £500 had been allocated to cover costs incurred. On the whole there was ample evidence on which the jury could come to the conclusion they did. Some other points which are made on the summing up do not seem to us important; a mistake was made about the cheque in one case, but the whole matter was fresh in the minds of the jury.

One other point remains to be dealt with. Mr. Powell says that under s. 85 of the Larceny Act, 1861, there can be no conviction, because the facts as to the disposal of the money by the appellant were first disclosed by him under compulsory process. He says that if you are cross-examined and questions

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Ridley J.

are put to you which you do not want to answer, that is compulsory process, and answers given are protected and cannot be the foundation of proceedings. It seems to us that "compulsory process" are words which signify more than the mere putting questions to the witness which he does not desire to answer. If there is a compulsory examination, such as a bill in equity or an interrogatory, no doubt that is compulsory process; and it is possible that if a man claims privilege on the ground that his answers would tend to incriminate him, and is then ordered to answer, that may be treated as compulsory process; but it is not necessary to decide such a point now. No such privilege was claimed here. The mere fact that he was asked to produce documents does not seem to us to render the examination compulsory process in a Court of law. Therefore the conviction must be affirmed.

Appeal dismissed.

Solicitors for Appellant—*A. de Fleury & Co.*

A. L. B. T.

BEFORE

MR. JUSTICE RIDLEY, MR. JUSTICE COLERIDGE, AND MR. JUSTICE HORRIDGE.

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GEORGE BELL.

The proper term of a sentence ought not to be extended in order to found jurisdiction for inflicting preventive detention.

This was an appeal against sentence and an application for leave to appeal against conviction as a habitual criminal. Appellant was convicted of larceny from the person and of being a habitual criminal, at the Essex Sessions, on the 27th May, 1914, and was sentenced to three years' penal servitude and five years' preventive detention

Cyril Renton for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant was convicted of stealing a cigar-case, and has received a very severe sentence for this offence, apparently for the purpose of enabling him to be dealt with as a habitual criminal; the Chairman said, in sentencing him, "We have to pass a sentence of penal servitude and a sentence of preventive detention." This was held to be wrong in *Jones*, 6 Cr. App. R. 1; 27 T. L. R. 108 (1910).

O. S Buckmaster, for the Crown. A sentence of penal servitude was justified in the circumstances. The appellant had already served a sentence of three years' penal servitude for a similar offence, which had had no reformative effect, as is shewn by his subsequent convictions. He has been convicted twenty times, and also six times summarily, and had only been out of prison four days when he committed this offence.

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GEORGE BELL.

Lord Coleridge J.

LORD COLERIDGE J.: The appellant was convicted of larceny from the person, and of being a habitual criminal; he was sentenced to three years' penal servitude and five years' preventive detention. It is quite clear that the magistrates thought that he ought to be sentenced to five years' preventive detention, but that they could not impose it without passing a sentence of three years' penal servitude. Therefore, in order to clothe themselves with jurisdiction to pass the sentence of preventive detention, they passed a sentence of penal servitude which otherwise they would not have passed. In our view this course was wholly wrong; the magistrates should fix the sentence apart altogether from the conviction as a habitual criminal, and they would only have passed a sentence of hard labour but for this. Although no doubt the appellant has had a long career of crime, we do not think that the offence was of such a grave character as necessarily to involve penal servitude. In the circumstances we reduce the sentence to that which we think would have been passed but for this erroneous view, namely, twelve months' imprisonment with hard labour.

Sentence reduced.

A. L. B. T.

BEFORE

MR. JUSTICE RIDLEY, MR. JUSTICE BANKES, AND MR. JUSTICE AVORY.

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JOHN LIVOCK.

It is not a misdirection to tell the jury, when the appellant on oath contradicts a witness on a crucial point, that their verdict should depend on the question which of the two they believed.

When counsel has elected not to call certain persons as witnesses at the trial, the Court will not, as a rule, allow them to be called on the appeal.

This was an appeal against conviction, by leave of Atkin J., and an application for leave to call further evidence and to appeal against sentence. Appellant was convicted of feloniously receiving stolen property, at the Reading Assizes, on the 5th June, 1914, before the Lord Chief Justice, and was sentenced to eighteen months' imprisonment with hard labour.

Wickham for the appellant, who was present. The appellant was convicted of receiving a bond which belonged to a man named Todd, and which had been stolen in a burglary some months before. There was no evidence that the bond was in the appellant's possession, except a statement by a witness, Walker, that the appellant had told him that he had had the bond in his possession for eight months, and had cashed the last coupon. This was denied by the appellant on oath, but the Lord Chief Justice did not refer to this fact in his summing up. There was no such control over the bond by the appellant as would constitute possession. See *Wiley*, 2 Den. C. C. 37; T. & M. 367; 20 L. J. M. C. 4; 15 Jur. 134; 4 Cox C. C. 414 (1850).

Secondly, there was no evidence of recent possession; the bond had been stolen four months before the time when the appellant was said to be dealing with it.

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JOHN LIVOCK.

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Avory J.

Lastly, there was no evidence that the appellant knew that the bond had been stolen, which is necessary to secure a conviction. *Densley*, 6 Car. & P. 399 (1834).

I ask leave to call witnesses who were not called at the trial, the expense of serving a subpœna being too great. It is true that Mr. J. B. Matthews, K.C., who defended the appellant at the trial, elected to call no evidence, probably because of the expense, and no *subpœnas* though issued were served.

The sentence was too severe; over thirty years have elapsed since his last conviction, and he has borne a good character since. He was three months in prison before his trial.

Comyns Carr, for the Crown, was not called upon.

BANKES J.: The appellant was convicted of receiving a bond knowing it to have been stolen. The evidence was that it had been stolen at the time of a burglary which took place at a house in Berkshire last August. The appellant was found dealing with the bond about the end of last year or the beginning of this year. He was defended at his trial, and the defence was that there was no evidence of any recent possession, and really no evidence of any possession at all. The evidence for the prosecution included the evidence of Walker, a stockbroker, to whom the appellant was introduced, and with whom he tried to arrange for the disposal of the bond. He deposed to a conversation with the appellant, in which the appellant had said that he had had the bond in his possession for eight months, and had cashed the last coupon. If that conversation took place, it was evidence on both points; it pointed both to recent possession and to full control of the bond. At the end of the case for the prosecution Mr. Matthews, who defended the appellant, admitted that this conversation precluded him from submitting that there was no evidence, and the Court concurs in that view. The only question, therefore, is whether the Lord Chief Justice left the case properly to the jury. On more than one occasion he pointed out that it was a question of fact, but said that if he had to decide it he would look to the conversation deposed to as the critical point in the case, and would ask himself whether he believed Walker in spite of the appellant's contradictions. The Lord Chief Justice put the question clearly to the jury, and told them that their ultimate

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Bankes J.

decision depended on the view they took on this point. The jury convicted the appellant, and in our opinion there is no ground for disturbing the verdict.

We are asked to allow further evidence to be called, but we are told that Mr. Matthews, knowing what the witnesses would say, elected to call no evidence. In these circumstances we cannot grant the application.

As to sentence the Lord Chief Justice fully considered the matter, and said that he did not take into account convictions that had taken place a long time ago. There is no ground, therefore, for interfering with his discretion.

Appeal dismissed.

Solicitors for Appellant—*Thorne, Mockridge, Owles, Limmer and Wood.*

A. L. B. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING, AND MR. JUSTICE AVORY.

THOMAS McGILL.

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15 *July*.

An inadequate summing up may be a ground for quashing a conviction.

This was an appeal against conviction by leave of the full Court. Appellant was convicted of larceny, at the Salford Hundred Sessions, on the 9th June, 1914, and was sentenced to twelve months' imprisonment with hard labour.

Hildesheimer, for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant and a man named Antony were convicted of larceny from a till in a public-house. The facts were that a man who was said to be the appellant entered the public-house and ordered a drink; Antony entered shortly afterwards. A little later Johnson, the barman, was called away to answer the parlour bell; he returned and drew some beer, which he took to the parlour, and as he came back he saw the first man leaving the bar. Antony remained a short time and then went out; Johnson then found that money was missing from the till, followed Antony, and gave him in charge. Although £11 was missing, none of the money was found on Antony. A description of the wanted man was given to the police, but it was of an exceedingly vague character, being merely "About 5 feet 5 inches, dressed in a dark overcoat and grey trousers." Four days later the appellant was arrested and identified by Johnson. He had only seen him casually for a few moments, and I submit that there was not sufficient evidence of identity to justify a conviction, especially as there was considerable evidence of an *alibi*.

The summing up only consisted of a few sentences, with no

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THOMAS McGILL.

Reading L.C.J.
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reference to the question of identity or to the *alibi*. There were other people in the bar at the time of the theft, so that even if the appellant was correctly identified, it did not follow that he was the thief. This was a further reason why a proper summing up was necessary.

M'Cleary for the Crown. I admit that the summing up was not satisfactory, and the case must be treated as if there had been none. It was a question of fact for the jury, who had all the evidence before them.

DARLING J.: In this case the appellant and Antony were charged with stealing money from the till in a public-house, and both were found guilty. The evidence was that the appellant was in the public-house when the money was stolen at the same time as Antony, and also another person, who was referred to in the case as "the old gentleman," and who has since died. The money was stolen while the barman was called out of the bar to answer a bell, and it is possible that the bell was rung by the people in the parlour on purpose to get him out of the bar. The evidence against the appellant is only that the barman recognised him as being one of the three people who were in the bar before he left and after he returned. If the jury had been directed as to the real points in the case, it may be that the conviction would have been a proper one, but it is clear that the appellant might have been in the bar and yet guiltless. This was never put before the jury, in fact, no point was put before them, neither any point of law nor any fact, nor was there any indication how any fact bore on the case. Counsel for the prosecution suggests that we must treat this summing up as if it did not exist, but it does exist, and is worse than no summing up at all. There may be cases so plain on the face of them that the jury may simply be asked what their verdict is, remembering that it is necessary for the prosecution to prove their case. But this is not such a case. A good many propositions had to be considered before the appellant could be convicted, and the attention of the jury is called to none of them. If there had been no summing up at all, it would have been better, because this summing up was an indication that there was nothing to which to call the attention of the jury. The summing up was not merely bad, but was

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calculated to mislead the jury, and therefore, without our expressing any opinion whether the appellant is guilty or not, the conviction must be quashed.

Conviction quashed.

A. L. B. T.

[Antony, who was sentenced to eighteen months' imprisonment with hard labour, appealed successfully on July 28th.]

TOM JAMES PICKFORD.

In cases of living on immoral earnings it must not be assumed that the woman is the accomplice of the man.

This was an appeal against conviction and sentence by leave of the full Court. Appellant was convicted of living in part on the earnings of prostitution, at the London County Sessions, on the 5th May, 1914, before the Deputy-Chairman, and was sentenced to twenty-one months' imprisonment with hard labour.

Walter Stewart, for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The case for the Crown was that the appellant had met the prosecutrix, Annie Pugh, who was then a virtuous girl, at a cinema theatre; that at his suggestion she got employment at a mental asylum, but after a time visited him at his invitation, and was then taken by him and a Miss Lofthouse, who was his mistress, to the West End, and for some months lived there as a prostitute, giving her earnings to them. Later she lived at lodgings as a prostitute, giving him her earnings, and after a time she lived with the appellant. Finally, in March last he left her, taking the furniture, and then she complained to the police. The case for the defence was that when they first met the appellant saw that she was obviously a prostitute, and that he had connection with her that same night, and that they afterwards lived together, but that he never had any knowledge of the life which, according to the evidence, she was undoubtedly living. In so far as the girl's story spoke to the

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TOM JAMES PICKFORD.

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appellant's knowledge of the life she was living, it was entirely uncorroborated, nor was there any corroboration of her statement that he participated in her earnings.

Under the Vagrancy Act, 1898, 61 & 62 Vict. c. 39, s. 1, as amended by the Criminal Law Amendment Act, 1912, 2 & 3 Geo. 5, c. 20, s. 7 (1), the *onus* was in this case shifted on to the appellant. The Deputy-Chairman misdirected the jury by asking them the general question, without reference to any date within the period charged, whether the appellant had shewn them that he did not know the girl was a prostitute; there should have been a reference to the material times, for the appellant's own evidence was that when he first met her he knew she was a prostitute. He also told the jury that the appellant must have known that she was living as a prostitute, and made other remarks which begged the whole question which the jury had to decide. The whole summing up was in the nature of a speech for the prosecution, and this, combined with the various inaccurate statements, brought about, I submit, a miscarriage of justice. There should have been a warning to the jury of the danger of acting upon the evidence of an accomplice, unless it is corroborated. *Christie*, 10 Cr. App. R. 141, at p. 164; 109 L. T. 746; 30 T. L. R. 41 (1914).

The verdict was against the weight of evidence. The girl was obviously revengeful, and although she spoke of letters and telegrams, there was no documentary evidence to support her story, and the only documents produced at the trial contradicted her.

Roland Oliver for the Crown was not called upon.

The LORD CHIEF JUSTICE: The appellant in this case was convicted on an indictment charging him with living in part on the earnings of prostitution, namely, of a girl Annie Pugh between the 1st January, 1913, and the 14th March, 1914. The prosecution was under the Vagrancy Act, 1898, which enacts under s. 1 (1) that "Every male person who knowingly lives wholly or in part on the earnings of prostitution . . . shall be deemed a rogue and vagabond within the meaning of the Vagrancy Act, 1824, and may be dealt with accordingly." Under s. 1 (3), "Where a male person is proved to live with or to be habitually

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in the company of a prostitute *and has no visible means of subsistence*" (the words [in italics] have been amended by the Criminal Law Amendment Act, 1912, s. 7, thus: "or is proved to have exercised control, direction or influence over the movements of a prostitute in such a manner as to shew that he is aiding, abetting or compelling her prostitution with any other person, or generally"), "he shall, unless he can satisfy the Court to the contrary, be deemed to be knowingly living on the earnings of prostitution." It follows, therefore, that there is a shifting of the burden when certain facts are proved.

In this case, without going into details, it is sufficient to say that the case for the prosecution was that the man first met Annie Pugh in 1912, and got her a situation in a hospital; she then returned to him and he lived with her and then, knowing the life she was leading, after a time lived on her earnings as a prostitute. The defence was that the woman, who was of course the main witness for the prosecution, was vindictive and jealous, and had concocted the story against the appellant in consequence of his consorting with other women. It cannot be argued that there was not sufficient evidence to support the story of the prosecution, except on one point. It is argued that there was no sufficient corroboration of the story of Miss Pugh, because it is said that she was an accomplice, and that there ought to have been a warning by the judge to the jury not to accept her evidence unless it was corroborated. The Court is of opinion that there was ample evidence on which the jury could arrive at their verdict, and we see no ground for quashing the conviction as regards the weight of evidence. As to corroboration it has never been laid down that it is necessary to have corroboration, in a case of this kind; it is not essential. There may be cases where it is plain that the woman was an accomplice, and where what has been called "a rule of prudence and discretion" should be followed and the jury warned by the judge. But there are other cases where it is by no means clear that the woman was an accomplice; she may have acted under compulsion. In this case it is sufficient to say that if corroboration was needed, there was corroboration in the evidence given for the Crown, and the Court is therefore of opinion that there was sufficient evidence to support the verdict.

Then it is urged that there was misdirection, because, through-

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out a long and, as it seems to us, careful summing up, the judge used expressions which seemed to indicate that he was assuming as a fact that the appellant had knowledge that the girl was living the life of a prostitute, which might lead the jury to believe that that question was not an issue in the case. It is sufficient to say that, having considered all that has been said on behalf of the appellant, the Court is of opinion that though it may well be that there were sentences in the course of the summing up which, separated from their context, give rise to criticism, no fault can be found with it as a whole, and there is no ground for impeaching it. The appeal must be dismissed. We do not think that the sentence was too severe.

Appeal dismissed.

Solicitors for the Crown—*Wontner & Sons.*

A. L. B. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE COLERIDGE AND MR. JUSTICE AVORY.

JAMES GREENLEY.

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Murder.

When two similar acts, separately charged in two indictments, are done at practically the same time, on the trial of the former evidence of the latter may be admissible as part of the res gestae.

This was an appeal against conviction on a point of law. Appellant was convicted of wilful murder, on the 10th July, 1914, at the Stafford Assizes, before Rowlatt, J., and was sentenced to death.

Milward for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. The facts proved in this case are that the appellant, who had been out of work for some months, came into the room where his two daughters slept early one morning in April. One of them went into her mother's room and found her lying dead from a revolver shot; she returned, and the appellant then shot her sister dead and inflicted several wounds on her with a revolver. The appellant spent some hours writing some very remarkable documents, but when he went out in the afternoon the wounded daughter gave information to the police. He was committed for trial on two indictments charging him with the murder of his wife and daughter, and was convicted of the murder of his wife.

The ground of appeal is that evidence was improperly admitted of the shooting of the appellant's two daughters, and of the documents which he wrote, in which he referred to those facts and gave his reasons for what he had done. The appellant's story was that he shot his wife accidentally when "fooling" with his

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JAMES GREENLEY.

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revolver; that the shock of this drove him mad, and led to the shooting of his daughters. No motive for the shooting of the wife was ever suggested by the prosecution. The evidence could only be admissible to prove design or else as part of the *res gestae*. On either ground it would only be material if he was in his right mind, and no evidence of his sanity was given by the Crown. On the question of design it is necessary, in order to make the evidence admissible, to show that the cases were all of the same nature. In cases where it has been admitted the credibility of the accused came under consideration, as he set up that all the other cases were innocent as well as the one in question. On the question of *res gestae* there was no evidence to shew that the various shootings all formed part of the same transaction; the time of the wife's death was never fixed.

The judge misdirected the jury as to the evidence of a witness who testified that the appellant had made enquiries about a space for a grave, but admitted that this was not an unusual occurrence; in his summing up the judge referred to it as an outstanding feature. Further, he did not warn them, as he should have done, that they should not pay any attention to the later shootings unless they were satisfied of his sanity at that time.

Bosanquet and *L. G. Ram*, for the Crown, were not called upon.

The LORD CHIEF JUSTICE: The appellant was convicted of the murder of his wife, and on his behalf Mr. Milward, who defended him at his trial, argues that on three grounds the conviction ought to be quashed. It appears that the appellant lived with his wife and two daughters, and was a devoted husband and an indulgent father. He had been in the habit of practising with a revolver, but it is not suggested that he was practising with the idea of shooting his wife. On the night before the occurrence in question, according to his statement, he left the revolver in his jacket pocket downstairs. At 7 a.m. the next morning he came into his daughters' room and said, "Come and look at the mater." One daughter went into the mother's room and then gave a scream, and it appears that she found her mother lying dead, having been shot in the back of the head; there is no doubt that the appellant had shot her. His account was that he pointed the revolver at her, saying, "I am

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Reading L.C.J.

afraid nothing will cure headaches," and snapped the trigger, not knowing that it was loaded. He said that he must have gone downstairs and fetched the revolver without knowing it. That is one circumstance to which attention must be directed. A second important fact is that he said he did not know that the revolver was loaded, and the defence set up was that the shooting was an accident; but, on the facts, he shot one daughter dead almost immediately afterwards and fired several shots at the other.

The argument put forward is that the judge ought not to have admitted evidence of the shooting of either of the daughters. Mr. Milward urges that the evidence did not assist the jury to decide whether the appellant shot his wife by accident or design, and further, that, as the appellant's explanation was that he was demented when he shot his daughters, the jury ought to have made up their minds on that issue before the evidence could become relevant. The opinion of the Court is that it is overwhelmingly clear that the evidence was admissible. It was material to the point raised by the appellant that he must have gone down, without knowing it himself, to get the revolver, but it was conclusively material when the defence was that he did not know that it was loaded, whereas in fact he fired several times at his daughters.

Then it is argued that the judge misdirected the jury in calling their attention to the evidence of one witness who spoke to the appellant making enquiries about a grave. But the judge was careful to point out that, although this was a factor, too much attention should not be paid to it.

Further complaint is made that he did not warn the jury that they ought not to come to a conclusion about this murder until they had decided what was the prisoner's state of mind when he fired at his daughter. All the facts point to the necessity for the judge putting the case to the jury as he did; there was some evidence that the appellant shot his wife when he was insane, but the jury found him guilty, and we see no reason to interfere with that verdict.

Appeal dismissed.

A. L. B. T.

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L.C.J.
Lord
Coleridge J.
Avory J.

ISAAC ROGERS.

On an indictment for carnal knowledge of a girl not thirteen years old, her age must be strictly proved, and if her certificate of birth is put in she must be positively identified with the person therein certified.

This was an appeal against conviction and sentence by leave of the full Court. Appellant was committed of having had carnal knowledge of a girl under the age of thirteen years, on the 8th June, 1914, at the Bodmin Assizes, before Ridley, J., and was sentenced to three years' penal servitude.

W. T. Snell for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. The appellant was charged with having had connection with his step-daughter, and the prosecution proposed to call his wife as a witness; on the authority of *Leach*, [1912] A. C. 305; 81 L. J. K. B. 616; 106 L. T. 281; 22 Cox C. C. 721; 76 J. P. 201; 56 S. J. 342; 28 T. L. R. 289; 7 Cr. App. R. 157; the wife, who gave her name as Loveday Rogers, was asked whether she wished to give evidence against her husband, and refused to do so. The first ground of appeal is that the age of the girl was not properly proved. She was called, and gave her name as Evelyn Trewin, which was the name that appeared in the indictment, and said that she was nine years old last September. A police inspector then produced a birth certificate of a girl named Rosalie Evelyn Gwendoline Trewin, who was born on the 16th September, 1904, but he was unable to say that the prosecutrix was the girl mentioned in that certificate. The girl had also said her mother's name was Loveday Rogers; the name of the mother in the certificate was Loveday Ann Trewin. This indictment was under the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), and offences under that Act are expressly excluded from s. 123 (2) of the Children Act, 1908 (8 Edw. 7, c. 67), which provides that the age of a child or young person may be presumed from appearance, and therefore it was necessary for the age to be proved strictly, see *Day*, 9 Car. & P. 722 (1841); *Wedge*, 5 Car. & P. 298 (1832); *Thomas Simpson*, 15 Cox C. C. 323 (1883); and *Weaver*, L. R.

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ISAAC ROGERS.

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2 C. C. R. 85; 43 L. J. M. C. 13; 29 L. T. 544; 22 W. R. 190; 12 Cox C. C. 527 (1873); *Birtles*, 6 Cr. App. R. 177; 75 J. P. 288; 27 T. L. R. 402 (1911) is distinguishable, for in that case there was some evidence of identity.

The judge misdirected the jury in telling them that the doctor's evidence corroborated the story of the girl. The defence alleged that the condition of the girl was due to self-abuse; the doctor admitted that this was possible, though not probable, but that her condition was equally consistent with causes which were not put forward by the prosecution. His evidence was certainly consistent with the case for the defence. The judge also said that this insinuation against the daughter would not have been made if the defence had not known that the mother was not allowed to be called, whereas it had been suggested in cross-examination at the Police Court when the mother was a witness.

Evidence alleging a previous similar offence against the appellant, which was not charged in the indictment, was improperly admitted. In *Shellaker*, [1914] 1 K. B. 414; 83 L. J. K. B. 413; 110 L. T. 351; 78 J. P. 159; 30 T. L. R. 194; 9 Cr. App. R. 240, the Lord Chief Justice said that where such evidence was prejudicial and remote it ought not to be admitted; this was such a case. The evidence was not admissible within the principles laid down in *Makin* v. *Att.-Gen. of New South Wales*, [1894] A. C. 57; 63 L. J. P. C. 41; 6 R. 373; 69 L. T. 778; 17 Cox C. C. 704; 58 J. P. 148; and in *Ball*, (1911) A. C. 47; 80 L. J. K. B. 691; 103 L. T. 738; 75 J. P. 180; 22 Cox C. C. 366; 55 S. J. 139; 27 T. L. R. 162; 6 Cr. App. R. 31.

W. T. Laurance for the Crown. No objection was taken at the trial that the age of the girl had not been properly proved. If the girl could not give evidence of her age it will be impossible to prove the age in many cases of this character. *Bellis*, 6 Cr. App. R. 283 (1911), is in my favour. There was in this case sufficient internal evidence in the certificate to identify the girl as the child mentioned therein, coupled with the girl's own testimony.

[AVORY J.: In *Weaver* the Court held there was sufficient evidence of identity because of the evidence of the grandmother; that is the kind of evidence which is wanting in this case.]

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ISAAC ROGERS.

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Shellaker is authority that evidence of previous acts of connection was admissible. Corroboration of the girl's evidence is to be found in the fact that the appellant never denied the charge when the warrant was read over to him, as well as in the doctor's evidence. If the defence set up was true, the appellant's wife could have been called on his behalf to prove it.

The LORD CHIEF JUSTICE: The appellant was convicted of having had unlawful carnal knowledge of a girl under the age of thirteen years, and was sentenced to three years' penal servitude. On his behalf it is argued that there was no proof such as the law requires that the girl was under thirteen years of age, and also that there was no corroboration of the girl's evidence, and that the practice of the law is to require corroboration. Further, it is argued that evidence was admitted of previous offences which were not relevant to the issue at the trial.

The appellant was charged with having committed the offence on a girl who was called as a witness and gave the age of Evelyn Trewin. A certificate was produced of the birth of a girl named Rosalie Evelyn Gwendoline Trewin, whose mother was Loveday Ann Trewin. No evidence was given identifying the child with whom the offence was alleged to have been committed with the child whose birth was registered in the certificate produced. Some evidence is necessary to connect the girl with the certificate, and that evidence is entirely absent, although it could obviously have been given apart from the mother. On that ground we must give effect to the law which has been laid down in previous cases, notably *Weaver*, which was considered in *Bellis*. It was argued by Mr. Lawrance that, if we rule as we have done, it will be impossible to prove the offence in many cases; that is a view which the Court does not take. The conviction must, therefore, be quashed.

On the question of corroboration, no doubt the judge had in mind that some corroboration was necessary, but what he appears to have overlooked is that the medical evidence established that the general condition of the girl was equally consistent with causes which were not put forward by the prosecution, and was equally consistent with either the innocence or the guilt of the appellant. On that ground also we are of opinion that the con-

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viction must be quashed. The attention of the judge was not called to the question of proof of age.

One word on the third point which raises the same question as was dealt with in *Shellaker*. The Court is of opinion that the evidence was properly admitted in this case, but for the reasons already stated the conviction cannot stand.

Conviction quashed.

A. L. B. T.

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28 *July*.

RICHARD SAGAR.

When the issue is whether appellant was carrying on a genuine business, he is entitled to put in evidence receipts bearing on that point, and if his bank books are put in, to refer to entries in them.

This was an appeal against conviction on a point of law, and an application for leave to appeal against sentence, and to call further evidence. Appellant was convicted of obtaining goods by false pretences, on the 24th June, 1914, at the Winchester Assizes, before Ridley J., and was sentenced to twelve months' imprisonment with hard labour.

Thesiger for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The false pretence charged in the indictment was that the appellant was carrying on a genuine and *bonâ fide* business, and the sole issue at the trial was whether or not he was carrying on such a business. He gave evidence that he carried on business in Manchester as a manufacturers' agent, buying and selling anything, and among other things cycles. It was then proposed to put in a receipt from the Runwick Cycle Company for a payment made to them by him, but this receipt was excluded by the judge on the ground that it was not relevant to the issue. This was only one of a bundle of receipts shewing payments to various firms for articles of various descriptions which it was desired to put in, and which are now in Court. This evidence was strictly relevant to the issue that was being tried, and was

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most material for the defence. In long firm frauds evidence is often given that on searching the prisoner's house invoices were found, none of which were receipted; it must therefore be open to the defence to prove the converse.

It was also desired to put in the appellant's bank books to prove payments to particular firms, but the judge ruled that, although the bank books might be put in, the contents might not be given in evidence. I submit that such a distinction cannot be drawn. (He was stopped by the Court.)

Comyns Carr, for the Crown. The receipts were properly excluded, being hearsay evidence. They were the evidence of third parties who were not present, namely, of the persons who wrote the receipts. Unreceipted invoices found on a prisoner's premises may be admissions against him.

[AVORY J.: It was in issue whether the appellant was doing a genuine business with third parties.]

That does not make them parties to the case so as to render their statements admissible. The bank books were not evidence at all, so the judge with regard to them erred in the appellant's favour. The judge in his summing up assumed that the appellant's statement that he was dealing in other goods was true, so if the evidence was wrongly excluded the defect was cured.

The LORD CHIEF JUSTICE: The appellant was convicted of obtaining goods by false pretences, the false pretence being that he was carrying on a genuine and *bonâ fide* business in the name of Richard Sagar and Son, at 69, Hyde Road, Ardwick, Manchester, as manufacturers' agents and merchants. Two points have been taken by Mr. Thesiger on behalf of the appellant, first, that evidence was rejected which was admissible and of considerable importance; and secondly, that although his bank books were admitted in evidence his counsel was not allowed to refer to the entries in them, this again being important evidence and directly relevant to the issue. The real issue before the jury was whether the appellant was carrying on a genuine business, or whether, by pretending to carry on a genuine business, he was attempting to defraud persons from whom he ordered

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RICHARD SAGAR.

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goods. In a case of that character it was essential for the defence to establish that *bonâ fide* transactions had been carried on by the defendant in the name under which he traded, and for that purpose it was proposed to put in evidence certain documents, namely, receipts by a firm who, according to the evidence of the appellant, had sold him goods and had given him receipts for payments made in respect of those goods. The appellant in the witness-box began to state the facts and, dealing with the first case, counsel proposed to put in the receipt. The essence of this transaction was that it was a *bonâ fide* purchase, carried out in the usual way with the usual mercantile documents and a receipt for payment; he was not allowed to put in that receipt, and consequently did not put in further receipts of a similar character.

Further, although he was allowed to put in his bank books, he was not allowed to refer to the entries in them, shewing debits representing payments made by him, that evidence being also excluded. We are of opinion that the evidence was admissible in law, and that its exclusion has prevented the appellant from putting forward a substantial part of his defence. The only question is whether the mischief is cured by the summing up. It cannot be said that the jury had it properly brought to their minds that the evidence, if admitted, might have established the defence. It is impossible to say that the defect was cured, nor can we say that, if the evidence which was wrongly excluded had been admitted, the jury would have come to the same conclusion. Consequently the conviction must be quashed.

Conviction quashed.

A. L. B. T.

JANE MONTGOMERY.

Severity of sentence mitigated in view of abstention from crime and of age.

This was an appeal against sentence, by leave of Bankes J. Appellant was convicted of obtaining goods by false pretences, at the Surrey Sessions, on the 2nd July, 1914, and was sentenced to five years' penal servitude.

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JANE MONTGOMERY.

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Appellant in person. Since my release from prison in 1911 I have been doing needlework and giving lessons in music.

N. L. Goddard, for the Crown.

The LORD CHIEF JUSTICE: The appellant pleaded guilty to an indictment charging her with obtaining goods by false pretences, and was sentenced to five years' penal servitude. The Chairman was influenced by her record, which is undoubtedly an unpromising one, since she has already served two terms of penal servitude in addition to a number of sentences of imprisonment. Having regard, however, to the facts before us, and to the information which we have been able to obtain, and to the fact that she has been out of prison since 1911, and that no charge has been brought against her since then until now, and also in view of her age, the Court reduces the sentence to one of three years' penal servitude. It is impossible to do otherwise than sentence her to penal servitude in view of her continued career of crime.

Sentence reduced.

A. L. B. T.

ELIAS HIRST.

The Court will correct a sentence inflicted under a misapprehension of the defendant's plea.

This was an appeal against sentence, by leave of Bankes J. Appellant was convicted of attempted larceny, at the Chester City Sessions, on the 2nd July, 1914, and was sentenced to three years' penal servitude.

Appellant in person.

Bertram Long, for the Crown. I admit that the sentence cannot be supported.

The LORD CHIEF JUSTICE: The appellant pleaded guilty to an indictment charging him with attempting to steal, and was

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ELIAS HIRST.

Reading L.C.J.

sentenced to three years' penal servitude. It is obvious that there was a misapprehension in the mind of the Recorder, and that he did not realise that the appellant had pleaded guilty to the attempt, and not to the full offence. For the attempt a sentence of penal servitude cannot be passed, and we therefore substitute one of twelve months' imprisonment with hard labour.

Sentence reduced.

A. L. B. T.

THOMAS ANTONY.

See p. 269 *above.*

The same counsel appeared as in the case there reported.

Conviction quashed.

BEFORE

MR. JUSTICE BANKES, MR. JUSTICE AVORY, AND MR. JUSTICE SHEARMAN.

1914
29 *July*.

JOHN SYME.

The Court will only hear evidence to prove misconduct of a jury or an individual juror when the allegation is of a very serious kind.

This was an appeal against conviction on matters of law. Appellant was convicted of libel after a trial in the King's Bench Division, on the 17th July, 1914, before Lord Coleridge J., and was sentenced to eight months' imprisonment.

The appellant, who was an ex-inspector of the Metropolitan Police, was convicted of publishing a false and malicious libel on Sir Edward Henry, the Commissioner of Police for the Metropolis. The libel was contained in a pamphlet entitled "Fighting Officialdom: A Three Years Battle against Police and Home Office Persecution," in which Sir Edward Henry was accused of "condoning and encouraging perjury, blackmail, tyranny of superior over inferior, manufacturing of charges, and general misconduct of superior police." The trial occupied six days.

Appellant in person. I desire to call a police-constable to give evidence that one of the jurymen, on the evening of the first day of the trial, informed him that they were all friends of constables, and whatever I said they would decide against me.

The appellant then proceeded to deal with the seven grounds of appeal contained in his notice of appeal, none of which are material for the purpose of this report.

Bodkin (with him *Sir John Simon*, *A.-G.*, *Branson* and *Gattie*) for the Crown, who was called on only on the principle on which evidence as to misconduct on the part of a juryman

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outside the Court was admissible. Some such inquiry was allowed in *Hancox*, 29 T. L. R. 331; 8 Cr. App. R. 193 (1913), but it was there stated that the admission of evidence, by which it was sought to prove that the jury were so constituted that a fair trial was not likely to result, was not to form any precedent. I submit that the Court ought not to quash a conviction for such a reason unless, before the Criminal Appeal Act, a new trial or a *Venire de novo* would have been granted.

[SHEARMAN J.: The terms of s. 4 of the Criminal Appeal Act are something like the terms on which a new trial can be granted in civil matters.]

Therefore it is material to look at the authorities dealing with alleged misconduct on the part of a juryman in civil actions. In *Onions* v. *Naish*, 7 Price, 203 (1819), the Court refused to grant a rule for setting aside a verdict on the affidavit of the unsuccessful plaintiff that the jury included a relation of the defendant who had expressed himself in strong terms in favour of the defendant's case. In *Hartwright* v. *Badham*, 11 Price, 383 (1822), one point raised in the affidavit filed in support of a new trial was misconduct on the part of the foreman of the jury, who held land under the plaintiff, and who was said to have unduly influenced the other members of the jury. The Court determined that that part of the affidavit which imputed misconduct could not be admitted.

[BANKES J.: That is influence exercised in Court.]

In *Dent* v. *The Hundred of Hertford*, 2 Salk. 645 (1697), a new trial was granted upon affidavit that the foreman declared the plaintiff should never have a verdict whatever witnesses he produced. That is the whole report of the case. In *Sir George Wynn* v. *Bishop of Bangor*, 2 Comyns, 601 (1728), a new trial was granted, one of the reasons being that a juror had said that the plaintiff was a neighbour, and right or wrong he would give it for him. In *Newton*, 28 T. L. R. 362; 7 Cr. App. R. 214 (1912), the conviction was quashed because the jury, in coming to a conclusion, took matters into consideration which they ought not to have done. *Willmont*, 10 Cr. App. R. 173; 30 T. L. R.

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499 (1914), is the most recent case with reference to such a matter. In *Murphy*, L. R. 2 P. C. 535; 6 Moore P. C. (N. S.) 177; 38 L. J. P. C. 53; 21 L. T. 598; 17 W. R. 1047; 11 Cox C. C. 372 (1869), it was held that a *Venire de novo* cannot be awarded after verdict upon a charge of felony, tried upon a good indictment and by a competent tribunal, but the case is not of much assistance here, where the charge was one of misdemeanour.

Dealing with the facts of this case, the Court has a mere statement which has in some way come to the appellant, and that is not, in my submission, material on which this Court can act under s. 4 of the Criminal Appeal Act. It is very undesirable to hold an investigation into such a matter.

[AVORY J.: In *Truman*, 9 Cr. App. R. 20 (1913), a case which I tried, the jury thought that the prisoner was wasting time and doing nothing to prove his plea of justification. I refused to discharge the jury, and they convicted the prisoner. This was made one of the grounds in his notice of appeal, but his counsel on the appeal abandoned the point, and the Court said he had acted rightly in so doing.]

Appellant in reply. *Hancox* is distinguishable. The constable is prepared to give evidence which would shew that I was tried by a jury of eleven, and not twelve.

BANKES J.: This is an appeal against conviction for libel, and the appellant has given notice of appeal in which he has set out seven grounds on which he bases his appeal, but before entering on these grounds he applied for leave to call a policeman, whose name he mentioned, and who he stated would give evidence of misconduct on the part of one of the jury. The Court has considered this application, and, without intending to lay down any general rule, is not prepared to accede to this application. The Court, in our opinion, ought to be very cautious in admitting this class of evidence, and certainly ought not to do so unless the evidence, if admitted, would compel the Court to quash the conviction, and unless the application is based upon substantial information.

Applying that rule to this case, the appellant on the fifth day

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of the trial stated to the jury that he had discovered misconduct on the part of one of their number; no application was made for a new trial, but one or two other references were made to the matter in the course of the trial. The appellant gave notice of appeal with full knowledge of the incident, and among the questions asked in the form is the following:—"Do you desire to apply for leave to call any witnesses on your appeal?" to which he answered "No," and in his grounds of appeal no reference is made to the matter. It would seem therefore that the appellant, with knowledge of the matter, had elected not to make an application to call this evidence. The application is now made, and there is nothing to support it but the statement of the appellant that some one else has told him that he was in a position to give certain evidence. No affidavit and no statement of the names of the persons who repeated this allegation comes before the Court, and it comes very near to being mere gossip; and when one considers that that is the nature of the application, what does it amount to? The appellant says that some one else said that another person had told him a remark alleged to have been made by a juryman. Assuming that something of the kind was said, is it anything more than a kind of anticipatory statement of what the juryman thought was likely to happen? It may be unwise to make such a statement, but unless he says that whatever the evidence may be he is determined to come to a certain result, it cannot be a ground for interfering with the conviction. On these grounds the application to call evidence is not granted.

His Lordship then dealt with the grounds of appeal, and gave the reasons of the Court for dismissing the appeal.

Appeal dismissed.

A. L. B. T.

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